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RECORD, CASE No. 13,656.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No, 103.

THEODORE J. MOELLE, APPELLANT,

vs.

JAMES K. O. SHERWOOD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 25, 1889.

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1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, and the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court at the term of May, A. D. 1888.

Be it remembered that on the 26th day of June, A. D. 1885, a bill in equity was filed in the office of the clerk of said circuit court; which said bill is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES K. O. SHERWOOD, Complainant, *vs.* THEODORE J. MOELLE, Defendant. } In Chancery. No. —, Docket —.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

James K. O. Sherwood, a resident of Kings county, New York, and a citizen of the State of New York, brings this his bill of complaint against Theodore J. Moelle, a resident of Nuckolls county and a citizen of the State of Nebraska; and thereupon your orator complains and says that the complainant and defendant above named are residents and citizens of the several places hereinbefore mentioned, and that the matter in controversy in this suit exceeds the sum or value of five hundred dollars, exclusive of costs.

And your orator humbly showeth unto your honors that at the commencement of this suit he was and for a long time prior
2 thereto and still is the owner in fee simple and entitled to the possession of the southeast quarter of section numbered 31, in township numbered 3 north, of range numbered 8 east, of the 6th principal meridian, situated in the county of Nuckolls, State of Nebraska, all of which real estate was at the commencement of this suit of the value of one thousand dollars and more.

That your orator's title, claim, ownership, and estate in and right of possession to said real estate arise out of and exist by reason of the following facts and circumstances and are derived from and based upon debts and muniments of title hereinafter set forth and described, to wit: On November 1st, 1871, the said land was, with other lands, patented by the United States to one Geo. L. Bittinger, and on the 21st day of November, 1878, the State of Nebraska, by the treasurer of Nuckolls county, Nebraska, then duly qualified, elected, and acting as such, made, executed, and delivered to one Ferdinand Furst a certain tax deed in the exact form prescribed by the statutes of the State of Nebraska then governing tax deeds, and the said deed was signed and given under his hand and seal by the treasurer of the said county of Nuckolls and was duly witnessed and attested by the signature of the county clerk of the said county, who attached to said deed the seal of said county, which seal was in the

regular form and was the seal that had long prior to that time been adopted by the board of county commissioners of said Nuckolls county, which board had selected the emblems and devices therein indicated, and said board had procured by the county clerk thereof and said seal had been used for many years prior to that time and was then and now is the only and exclusive seal of said county of Nuckolls, of the State of Nebraska, and said deed was by the treasurer of said county duly acknowledged, as prescribed by law,
3 before an officer duly authorized to take such acknowledgment, which was duly attested thereon, and said tax deed was executed and delivered and was on the 3rd day of February, A. D. 1879, duly filed for record and recorded in the Book of Deeds numbered "D," at pages 422 and 423 of records of said county of Nuckolls, as will be more fully shown by said records.

And your orator further showeth unto your honors that said real estate is, was, and always has been wholly unoccupied, wild, and uncultivated; that on the 22nd day of August, 1882, the said George L. Bittinger, patentee of said land, together with his wife, made, executed, and delivered, and thereby conveyed to one L. P. Dosh, by deed of quitclaim, the legal title to the said southeast quarter of section 31, township 3 north, of range 8, which deed, duly executed according to law, was on the 19th day of September, 1882, duly filed for record and recorded in Book "H" of Deeds, at page 21, of the records of Nuckolls county, and on the 17th day of October, 1882, the said Ferdinand Furst and wife made, executed, and delivered to the said L. P. Dosh their deed of quitclaim and thereby conveyed to the said L. P. Dosh all their right, title, and interest arising from or under the tax claim aforesaid, which deed was duly filed for record October 27th, 1882, and was recorded in the records of Nuckolls county in Book "H" of Deeds, at page 98.

And your orator further shows that on the 27th day of October, 1882, the said L. P. Dosh, together with his wife, made, executed, and delivered to J. R. Dosh a warranty deed conveying all the title to said land, both legal and equitable, which deed was duly recorded on the 20th day of November, 1882, in Book "H" of Deeds, at page 153.

And your orator further shows unto your honors that on or
4 about the 30th day of January, 1883, your orator purchased of the said J. R. Dosh, for full value, in the regular course of business, together with all liens, the said southeast quarter of section 31, township numbered 3 north, of range numbered 8, and on said day the said J. R. Dosh, together with his wife, by warranty deed conveyed said lands unto your orator, which deed was on the 24th day of April, 1885, duly filed for record in the clerk's office Nuckolls county, Nebraska, and there recorded in Book "K," at page 433.

Your orator further shows that more than three years have elapsed subsequent to the recording of the tax deed hereinbefore described prior to the commencement of this suit, and in no part of said time was the defendant or any person claiming by, through, or under him in possession or occupancy of said real estate or any part thereof and no action has ever been commenced by said defendant or any

other person to recover possession of said real estate or any part thereof, nor has any action of any kind involving the title to the said real estate ever been commenced except this suit.

And your orator further showeth that the said defendant claims that by some secret and unrecorded deed from George L. Bittinger to have some title or estate in said lands superior to the title of your orator and at the time of the commencement of this suit the said defendant did and ever since has claimed some lien, interest, title to, and estate in all of said real estate adverse to the interest, title, and estate of your orator, which claim of said defendant so affects your orator's title to said real estate as to render the sale or disposition thereof impossible, hinders and disturbs your orator in his title to and right of possession of the same, and your orator is wholly ignorant of the nature of said claim of the said defendant and in what said claim consists, except so far as the said defendant disputes the validity of your orator's title to the said real estate, and claims by reason of his unrecorded deed to be the owner thereof or otherwise interested therein as above set forth.

And your orator well hoped that no dispute would have arisen touching the title to and right of possession of said real estate, but that the said defendant would have complied with the reasonable demand of your orator and abandoned his said claim to said real estate and would have allowed your orator quietly and peaceably to have possession thereof, but now so it is, may it please your honors, that said defendant is contriving how to wrong and injure your orator in the premises by claiming to be the owner of said real estate and by trying to obtain, take, and keep possession thereof and by denying and slandering your orator's title to and his right of possession thereof, all of which acts and doings and pretenses of said defendant are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator in the premises.

And your orator submits, forasmuch as he is without remedy, save in this court, where matters and things of this and like nature are cognizable and relievable, that his title to said real estate should be quieted by the decree of this court as against said defendant and all persons claiming through and under him and be adjudged to be perfect and valid as against the said defendant and all persons claiming by, through, or under him, and that the said defendant and all persons claiming through or under him be forever enjoined and forbidden from in any way or manner injuring or hindering your orator in his title or right of possession thereof. To the end, therefore, that the said defendant, if he can, may show why your orator should not have the relief hereby prayed, and that he may show the nature of divers estate, interest, or claim which he sets up and asserts to said real estate, and that he may, to the best and utmost of his ability, knowledge, information, and belief, but without oath (answer under oath being hereby expressly waived), full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged as fully and particularly as though the same were hereinafter repeated and he thereunto distinctly interrogated, and that it may be by decree of

your honors declared that your orator's title to and in said real estate is perfect and valid as against the said defendants herein and all persons claiming by, through, or under him, and that your orator's title to the said real estate may be forever quieted in him by your honor's said decree and your orator's right of possession by thereby assured, and that said defendants may be decreed to have no estate, right, title, or interest in or to said real estate or any part thereof, and that he may be enjoined from in any manner injuring or hindering your orator in his title to and possession of said real estate, and the pretended conveyances of record, if any there be, in the name of said defendant be cancelled of record by decree of this court, and the said defendant be required to pay the costs of this suit, and that your orator may have decreed to him by your honors such other and further relief as in equity and good conscience he may be entitled to and as is agreeable to equity—

May it please your honors to grant unto your orator the most gracious writ of subpœna to issue out of and under the
7 seal of this honorable court, directed to Theodore J. Moelle, the said defendant herein, therein and thereby commanding him, on a certain day and under a certain penalty therein to be inserted, that he personally be and appear before your honors in this honorable court, then and there to answer the premises and to stand to and abide by and perform such order and decree herein as to this court and to your honors shall seem proper and as shall be agreeable to equity and good conscience; and your orator will, as in duty bound, ever pray.

DWIGHT HULL,
Solicitor for Complainant and of Counsel.

Upon the back of said bill appear endorsements in words and figures following, to wit: No. 361, doc. 1. James K. O. Sherwood *vs.* Theodore J. Moelle. Bill in eqyity. Filed Jun-26, 1885. Elmer D. Frank, clerk. Dwight Hull, solicitor.

Thereupon, afterwards, to wit, on the 9th day of November, 1885, answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES K. O. SHERWOOD, Complainant,
vs.
THEODORE J. MOELLE, Defendant. } In Equity.

The Answer of Theodore J. Moelle, Defendant, to the Bill of Complaint of James K. O. Sherwood, Complainant.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other

8 imperfections in the said complainant's said bill of complaint contained, for answer thereto or unto *su* much and *each* parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, says:

This defendant denies that the said complainant has or at any time has had any estate, title, or interest in or to the lands in his said bill of complaint described or any of them; denies that on the 21st day of November, 1878, or at any other time, the county treasurer of Nuckolls county, Nebraska, made, executed, or delivered to one Ferdinand Furst or to any other person a tax deed or other instruments conveying or purporting to convey said lands or any of them to the said Furst or any other person; denies that on the 22nd day of August, 1882, the said George L. Bittenger, patentee of said land, had or conveyed by quitclaim deed or otherwise the legal title or any interest in said lands or any of them to one I. P. Dosh or any other person.

Denies that on the 17th day of October, 1882, the said Ferdinand Furst had or conveyed to the said I. P. Dosh or to any other person by quitclaim deed or otherwise any right, title, or interest in or to said lands or any of them.

Denies that on the 27th day of October, 1882, the said I. P. Dosh had or conveyed to the said J. R. Dosh by warranty deed or otherwise any legal or equitable estate or interest in or to said lands or any of them.

Denies that on the 30th day of January, 1883, or at any other time, the said complainant purchased of the said J. R. Dosh said lands or any of them; and denies that at said last-named date, or at any other time, the said Dosh had or conveyed to said complainant, by warranty deed or otherwise, any title or estate, legal or equita-

9 ble, in or to said lands or any of them; and denies that said complainant hath at any time paid to said J. R. Dosh any money or other valuable thing for or on account of any conveyance or pretended conveyance of said lands or any of them.

And this defendant denies that for more than three years subsequent to the pretended recording of the said pretended tax deed, prior to the beginning of this action, this complainant hath not been in possession of said lands, but this defendant avers the fact to be that ever since the 23rd day of June, A. D. 1870, until this time this defendant and one Guthrie Probgue (Probyne), under whom this defendant claims title to said lands and by whom said lands were by good and sufficient deeds of conveyance conveyed to this defendant, have been successively in actual, open, and notorious occupation and possession of said lands and of all and every part of the same, claiming title thereto adversely to the said complainant and to all and every of the said persons through or under whom the said complainant claims title as in his said bill of complaint set forth.

And this defendant admits and avers the truth to be that the said George T. Bittinger did on the 23rd day of June, 1870, being then the owner and patentee of said land, as in said bill of com-

plaint averred, for a full and valuable consideration to him then paid by one Guthrie Probyne aforesaid, convey all and every of said lands by a good and sufficient warranty deed bearing said date and duly signed, witnessed, acknowledged, and delivered, his wife joining therein, to the said Probyne as by such deed, to which this defendant begs leave *leave* to refer when the same shall be produced, will appear, which deed was on the 20th day of August, 1883, duly filed for record in the clerk's office of said county and
10 recorded in Book "1" of deed records therein, at page 186.

And this defendant further admits and avers the truth to be that on the 24th day of August, 1883, the said Guthrie Probyne, being still the owner and well seized of said lands, did, for a valuable consideration to him then paid by this defendant, convey all and every of said lands by a good and sufficient warranty deed bearing said date and duly signed, witnessed, acknowledged, and delivered, his wife joining therein, to this defendant, as by such deed, to which this defendant begs leave to refer when the same shall be produced, will appear, which deed was on the 28th day of August, 1883, duly filed for record in the clerk's office of said county and recorded in Book "1" of deeds records in said office, at page 204.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged: without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HARWOOD, AMES & KELLY,
Solicitor- for Defendant.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 361, docket 1. In the circuit court of the United States for the district of Nebraska. James K. O.
11 Sherwood *vs.* Theodore J. Moelle. Answer. Filed Sep. 30, 1885. Elmer D. Frank, clerk. Refiled Nov. 9, 1885. Elmer D. Frank, clerk. Harwood, Ames & Kelly, solicitor- for defendant.

Thereupon, afterwards, at the November term of said court, on the 12th day of December, 1885, the following proceedings were had and done in said cause, as appears of record on folio 530, Journal "K" of said court, to wit:

JAMES K. O. SHERWOOD
vs. } 361, 1.
THEODORE J. MOELLE.

On motion leave is granted by the court to complainant to reply herein instanter.

Thereupon, afterwards, to wit, on the said 12th day of December, 1885, replication was filed in said case; which said replication is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

JAMES K. O. SHERWOOD
vs.
THEODORE J. MOELLE.

The replication of James K. O. Sherwood, plaintiff, to the answer of Theodore J. Moelle, defendant.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say- that *they* will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant *to be* uncertain, untrue, and in-
12 sufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray- as in and by his said bill of complaint he has already prayed.

DWIGHT HULL,
Solicitor for Plaintiff.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 361, doc. 1. U. S. circuit court, district of Nebraska. In equity. James K. O. Sherwood *vs.* Theodore J. Moelle. Replication. Filed Dec. 12, 1885. Elmer D. Frank, clerk. Dwight Hull, solicitor for plaintiff.

Thereupon, afterwards, at the January term of said court, on the 22nd day of February, 1887, the following proceedings were had and done in said cause, as appears of record on folio 843, Journal "L" of said court, to wit:

J. K. O. SHERWOOD
vs. } 361, 1.
THEODORE J. MOELLE.

By consent of parties it is ordered by the court that the time to take proofs herein be extended to May first, with leave to take the same in term time.

Thereupon, afterwards, to wit, on the 10th day of May, depositions were filed in said case; which said depositions are in words and figures following, to wit:

13 STATE OF NEW YORK, } ss:
County of New York, }

Be it remembered that on this 12th day of March, 1887, I, Charles M. Reynolds, a notary public in and for the said county and State, duly commissioned and qualified, authorized, and empowered to take depositions in causes pending in the circuit court of the United States, pursuant to the annexed notice, did call and cause to personally appear before me at my office, 115 Broadway, in the city of New York, county of New York, and State of New York, J. K. O. Sherwood to testify and the truth to say on the part and behalf of the plaintiff in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the district of Nebraska, at Omaha, in the district aforesaid, wherein J. K. O. Sherwood is plaintiff and Theodore J. Moelle is defendant.

And the said J. K. O. SHERWOOD being about the age of — and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said J. K. O. Sherwood and he did thereupon depose, testify, and say as follows:

Q. State your name, age, residence and occupation.

Ans. James K. O. Sherwood; I reside in Queens county, New York; age, 41, and by occupation an a dealer in real-estate securities, bonds, mortgages, and miscel-aneous stocks.

Q. Are you acquainted with the parties to the suit now pending in the United States circuit court for the district of Nebraska, wherein J. K. O. Sherwood is plaintiff and Thomas J. Moelle is defendant?

14 A. I am the plaintiff. I do not know the defendant.

Q. If you became the owner of the land in controversy, to wit, the southeast quarter of section 31, township 3, range 8, Nuckolls county, Nebraska, state when you bought the same and from whom.

A. I bought the land you refer to, together with other lands in the same section, from James R. Dosh, of Guthrie county, Iowa, on the 13th of January, 1883.

Q. What steps, if any, did you take to ascertain the condition of said land and the title thereto before purchasing the same?

A. I examined an abstract of title to that property and found a regular chain of conveyance from the United States Government down to J. R. Dosh; also from the records of certain tax sale covering said property I found a regular chain of evidence from the grantee in the tax deed down to J. R. Dosh. No other instrument affecting the title appeared of record and I was satisfied the title was perfect. I then had the land examined, and it was reported to me to be a fair quality of wild prairie which was lying vacant and unoccupied and had never been occupied.

Q. State what you paid for said land.

A. I paid $1,800.00 in cash for my purchase, as above stated.

Q. In what manner did you pay for said land?

A. I sent my personal check on the Corbin Banking Company of New York City to a bank at Stuart, Iowa, to be delivered to J. R. Dosh in exchange for his deed to me to the premises to which I have referred.

Q. Has your check ever been returned to you; if so, will you please have the commissioner attach a copy thereof to this
15 your deposition as an exhibit?

A. I have the original check and request the notary to attach the same to my deposition and mark it as Exhibit "A."

Q. State whether at the time you purchased the said land you did or did not believe you were getting a good title.

A. I certainly bought the land believing I had a good title, because I had every evidence that the title was good. I had no idea that any such controversy as now exists would arise, and I paid for it a reasonable price, believing I was getting a good piece of land with a perfect title in every shape. The land was unoccupied and title appeared to be perfect. The price at which the land was offered to me seemed to me a reasonable one, and I felt that I was getting a valuable piece of property with a perfect title for a fair consideration, and, believing this, I bought it as I have bought thousands of other acres and had not the faintest suspicion that the matters set up in the case at bar would ever be urged against me or my quiet possession of said premises.

J. K. O. SHERWOOD.

EXHIBIT A.

$1,800.00. NEW YORK, *Jan. 19th*, 1883.

The Corbin Banking Company pay to the order of Jacob R. Dosh eighteen hundred dollars.

No. 743. (New York.) J. K. O. SHERWOOD.

Endorsed: National Broadway bank. Paid. Jacob R. Dosh. Pay J. D. Everitt or order for collection on account of 'Change Bank of Stuart, Ia. W. B. Conger, cashier.

16 In the United States Circuit Court for the District of Nebraska.

STATE OF NEW YORK, }
County of New York. }

I, Charles M. Reynolds, a notary public in and for said county and State, authorized to take depositions to be used in causes pending in the circuit courts of the United States, do hereby certify that the reason for taking the foregoing deposition is and the fact is that the testimony of said witness is material and necessary for the said plaintiff in the cause in the caption of the said deposition named, and that the said witness live- at the time of taking said deposition in the city and State of New York, the same being at a greater distance than one hundred miles from Omaha, in the State of Nebraska, the place of trial of said cause, to wit, more than one hundred miles therefrom.

I further certify that, as appears by the notice hereto attached, due notice of the time and place of taking the said deposition and the names of witness to be examined were given.

I further certify that on the 12th day of March, 1887, at the hour of 10 o'clock in the forenoon, I was attended at my office, 115 Broadway, in the city, county, and State of New York aforesaid, by said witness, who was of sound mind and lawful age, and the said witness was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of witness and from his statements, and after carefully reading same to said witness he subscribed the same in my presence.

I further certify that neither the counsel for the plaintiff or
17 counsel for defendant were present at the taking of said deposition.

I have retained said deposition in my presence for the purpose of sealing up and directing the same, with his certificate of the reasons aforesaid for taking said deposition, with my own hand to the court for which the same was taken.

And I do further certify that I am not of counsel or attorney for either of the parties in said deposition and caption named or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 12th day of March, 1887.

CHAS. M. REYNOLDS, [SEAL.]
Notary Public, New York Co., No. 41.

Commissioner's fees, $10.
Paid by pl'ff.

Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 361, 1. Rec'd and filed May 10, 1887, & opened by order of court June 7, 1887. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the May term of said court, on the 13th day of June, 1887, the following proceedings were had and done in said cause, as appears of record on folio 179, Journal "M" of said court, to wit:

JAMES K. O. SHERWOOD
vs. } 361, 1.
THEODORE J. MOELLE.

On motion, leave is granted defendant to file cross-bill herein by July rules, and subsequent proceedings thereon to be had under rules.

JAMES K. O. SHERWOOD
vs.
THEODORE J. MOELLE. } 361, 1.

18 On motion, leave is granted by the court to take testimony herein in ninety days. Cause continued.

Thereupon, afterwards, to wit, on the 29th day of July, 1887, cross-bill was filed in said case; which said cross-bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

THEODORE J. MOELLE, Plaintiff in Cross-Bill,
vs.
JAMES K. O. SHERWOOD, Defendant in Cross-Bill. } In Chancery. No. 361, Doc. I.

To the honorable the circuit judges of the circuit court of the United States for the district of Nebraska:

Theodore J. Moelle, a resident of Nuckolls county and a citizen of the State of Nebraska, by leave of court brings this his cross-bill of complaint against James K. O. Sherwood, a resident of Kings county, New York, and a citizen of the State of New York; and thereupon your orator complains and says that the plaintiff and defendant above named are residents and citizens of the several places hereinbefore mentioned; that the matters in controversy in this suit exceed the sum or value of $2,000.00, exclusive of interest and costs.

And your orator humbly showeth unto your honors that at the commencement of this suit and for a long time prior thereto he was and still is the owner in fee simple and in the absolute possession of the south east quarter of section 31, township 3 north, of range 8 east, of the 6th P. M., situated in the county of Nuckolls and State of Nebraska; all of which real estate was, at the commencement of this suit, of the value of $2,000.00 and upwards; and your
19 orator's claim of ownership and estate in and right of possession to said real estate arises out of and exists by reason of the following facts and circumstances, and are derived from and are based upon the muniments of title hereinafter set forth and described:

1st. On November 1st, 1871, said land was with other property patented by the United States to one George L. Bittinger, which patent was on the 31st day of December, 1883, at 10 o'clock a. m. of said day, duly filed for record in the county clerk's office of said county and recorded in Book 1 of Deeds, at page 528.

2nd. On the 23rd day of June, 1870, the said George L. Bittinger and his wife, A. M. Bittinger, by their full covenants — warranty deed in writing of that date, duly signed, acknowledged, and delivered, conveyed said land to one Guthrie Probyne, together with other premises; which deed was on the 3rd day of January, 1871,

at 7 o'clock p. m., duly filed for record in the county clerk's office of Jefferson county, Nebraska, and recorded in Book "E" of Deeds, at page 116, the said Nuckolls county at that time being unorganized and attached to said Jefferson county for judicial, revenue, and other purposes; which deed was also on the 20th day of August, 1883, at 9 o'clock a. m., duly filed for record in the county clerk's office of Nuckolls county and recorded in Book 1 of Deeds, at page 186.

3rd. On the 24th day of August, 1883, the said Guthrie Probyne and Sarah Probyne, his wife, by their warranty deed of that date in writing, duly signed, acknowledged, and delivered, conveyed said premises to your orator, Theodore J. Moelle, who now is and from that time henceforward has been the owner in fee of said premises.

Your orator, further complaining, showeth unto your honors that the said defendant, J. K. O. Sherwood, L. P. Dosh, and
20 one Ferdinand Furst, grantees of said defendant, seeking and contriving to injure and slander the title of your orator and disturb your orator in the possession thereof, on the 22nd day of August, 1882, procured a quitclaim deed from said George L. Bittinger to the said L. P. Dosh and caused the same to be spread upon the records of said county; also on the 3rd day of February, 1879, said Dosh procured from said Furst a quitclaim deed to said premises, the said Furst having, on the 21st day of November, 1878, obtained a tax deed of said premises. On the 27th day of October, 1882, the said L. P. Dosh made a deed to J. R. Dosh and caused the same to be spread upon the records of said county in Book H of Deeds. On the 30th day of January, 1883, said J. R. Dosh made and executed a pretended warranty deed to said J. K. O. Sherwood and caused the same to be spread upon the records of said county, at page 433, in Book H.

Your orator, further complaining, showeth unto your honors that said tax deed — was made on the 21st day of November, 1878, to the said Ferdinand Furst, acknowledged on the 23rd day of November, 1878, and recorded on the 3rd day of February, 1879, in Book D of Deeds, at page 422, in Nuckolls county, was and is void for the following reasons:

1st. It was not attested by the seal and signature of the clerk of said county.

2nd. It was not attested by the seal of the county treasurer.

3rd. It was not attested by the seal of the county.

4th. It does not show where said land was sold for taxes.

5th. Said deed recites that the land was sold for taxes of 1875 for $131.90, which sum included the taxes not only upon this land, but also upon a large number of other tracts of land.

21 But your orator further alleges that said southeast quarter of section 31, township 3, range 8 east, of 6th P. M., was assessed at $400.

6th. Because said county commissioners levied a sinking fund for the year 1875, whereas there was in fact and truth no bonded indebtedness against said county, nor any indebtedness requiring the levy of a sinking fund.

7th. That they levied for that year a land and road tax which was null and void.

8th. The whole of said levy was excessive, irregular, and unauthorized for the year aforesaid.

9th. Your orator further alleges that said deed is void on its face for the reason that it appears by said deed that said land was sold at private sale, and it does not appear that said land was first offered at public sale and not sold for want of bidders and the return duly made thereof.

10th. Because it does not appear that the notice provided by the constitution that occupants shall be served with notice before the time of redemption expires was complied with.

Your orator further alleges that notwithstanding these facts said tax deed and other conveyances spread upon the records of said county are an apparent lien on said premises and cast a cloud on your orator's title and hinder and injure your orator in the free use and enjoyment thereof. Your orator herewith tenders and offers to pay all legal and just tax which may be found due against said premises, and your orator had well hoped that no dispute would have arisen with said defendants touching the title and the right of possession to said real estate, but that said defendants would have complied with the reasonable and just demands of your orator and accepted payment for the amount of tax justly due on said
22 land and abandoned his said claim on said real estate and allowed your orator to have peaceable possession thereof, but now, so it please your honors, said defendant is contriving how to wrong and injure your orator in the premises by claiming to be the owner of said real estate and by trying to take possession thereof and by denying and slandering your orator's title to and right of possession of said real estate; all of which acts and doings are contrary to equity and good conscience and tend to the manifest wrong and injury and oppression of your orator in the premises, in tender consideration whereof and inasmuch as your orator is wholly without remedy in the premises, save in this court of equity, where matters and things of this and like nature are cognizable and relievable, and whereas it is just and equitable that his title to said real estate be quieted by the decree of this court against the defendant and all persons claiming by, through, or under him and adjudged to be perfect and valid as to all persons claiming by, through, or under him, and that the said defendant and all persons claiming by, through, or under him should be forever enjoined and forbidden from in any way or manner injuring or hindering your orator in his title or right of possession thereof, and to the end, therefor, that the said defendant, if he can, may show why your orator should not have the relief herein prayed, and that he may show the nature of the divers estate, interest, or claim which he sets up and asserts to said real estate, and that he may, to the best and utmost of his ability, knowledge, or information and belief, but without oath (answer under oath being hereby expressly waived), full, true, direct, and perfect answer make to all and
23 singular the matters hereinbefore stated and charged as fully

and particularly as though the same were hereinafter repeated and he thereunto distinctly interrogated; and your orator prays that it may be decreed and declared by this honorable court that your orator's title to and in said real estate is perfect and valid as against the said defendant herein and all persons claiming by, through, or under him, and that your orator's title to and in said real estate may be forever quieted in him by said decree and your orator's title thereto be assured, and that said defendant may be decreed to have no title, right, or interest in or to said real estate or any part thereof except a lien for such taxes as may be just and rightfully and found due and legal, legally and properly levied and assessed against said property, and that said defendant and all persons claiming by, through, or under him may be enjoined from in any manner hindering or injuring your orator in the possession of and title to said premises, and that the pretended conveyances of record, as before alleged, from the said Bittinger to the said defendant and spread upon the records be cancelled of record by the decree of this court; that said defendant be required to pay the costs of this suit, and that your orator may have decreed to him by your honors such other and further relief as in equity and good conscience he is entitled to and as is agreeable to equity.

And may it please your honors to grant unto your orators the most gracious writ of subpœna to issue out of and under the seal of this court, directed to James K. O. Sherwood, the said defendant herein, commanding him on a certain day and under a certain penalty therein to be inserted that he personally appear and be
24 before your honors in this honorable court, then and there to answer the premises and to stand to and abide by and perform such order and decree therein as to the court and to your honors shall seem proper and as shall be agreeable to equity and good conscience; and your orator will, as in duty bound, ever pray.

HARWOOD, AMES & KELLY,
Solicitors for Complainant in Cross-Bill.

N. S. HARWOOD, *Of Counsel.*

Upon the back of said cross-bill appear endorsements in words and figures following, to wit: No. 361, docket 1. In the circuit court of the United States for the district of Nebraska. T. J. Moelle, plaintiff in cross-bill, *vs.* James K. O. Sherwood, defendant in cross-bill. Cross-bill. Leave to file this bill of this date, July 29th, '87. Montgomery & Jeffrey, sol's for Sherwood. Filed Jul- 29, 1887. Elmer D. Frank, clerk. Harwood, Ames & Kelly, attorneys for complainant in cross-bill.

Thereupon, afterwards, to wit, on the 28th day of October, 1887, answer to cross-bill was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

THEODORE J. MOELLE, Complainant,
vs.
JAMES K. O. SHERWOOD, Defendant,
No. 361, Docket 1.

Answer to Cross-Bill.

The answer of James K. O. Sherwood, defendant, to the cross-bill of complaint of the said Theodore J. Moelle, complainant.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage which can or may
25 be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, says:

This defendant admits the residence and citizenship of the parties as alleged in said cross-bill of complaint, and that the matter in controversy in this suit exceeds the sum or value of $2,000.00, exclusive of interest and costs.

This defendant denies that at the commencement of this suit or prior thereto or at the time the said complainant filed said cross-bill of complaint the said complainant was the owner in fee simple of the land described in said cross-bill of complaint; but he admits that at the time this suit was commenced the said cross-complainant was in possession of said land.

This defendant admits that said land was patented and that the patent was issued and recorded as alleged in said bill of complaint.

This defendant denies the allegation in said bill of complaint contained that on the 23rd day of June, 1870, George L. Bittinger and his wife, A. M. Bittinger, by their full-covenant warranty deed in writing of that date, duly signed, acknowledged, and delivered, conveyed said land to one Guthrie Probyne, and denies that any such deed was on the 3rd day of January, 1871, at 7 o'clock p. m., or at any other time, filed for record in the county clerk's office of Jefferson county, Nebraska, or recorded in Book "E" of Deeds, at page 116, or in any other book containing the records of said county.

This defendant admits that on January 3rd, 1871, Nuckolls county was unorganized and attached to Jefferson county, Nebraska, for judicial, revenue, and other purposes.

26 This defendant admits that an alleged deed from George L. Bittenger and his wife, A. M. Bittenger, to one Guthrie Probyne, dated the 23rd day of June, 1870, of the said land in controversy was, on the 20th day of August, 1883, at 9 o'clock a. m., filed for record in the office of the county clerk of Nuckolls county, and that said alleged deed was recorded in Book "I" of Deeds, at page 186, but this defendant alleges that no such deed was ever signed, acknowledged, or delivered by the said George L. and A. M.

Bittenger to the said Guthrie Probyne, and alleges that the deed, which was in fact signed, acknowledged, and delivered on the 23rd day of June, 1870, by George L. Bittenger and his wife, A. M. Bittenger, to Guthrie Probyne, conveyed the southwest quarter of section thirty-two (32) and not the southeast quarter of section thirty-one, and that the deed thus signed, acknowledged, and delivered was, on the 3rd day of June, 1871, at 7 o'clock p. m., duly filed for record in the office of the county clerk of Jefferson county, Nebraska, and was recorded in Book "E" of Deeds, at page 116, and that subsequent to said record the deed was changed to read "the southeast quarter of section thirty-one (31)," instead of "the southwest quarter of section thirty-two (32)," and that in such changed condition it became the alleged deed recorded, as above stated, August 20th, 1883, in the office of the clerk of Nuckolls county, in Book "I" of Deeds, at page 186.

This defendant admits that on August 24th, 1883, Guthrie Probyne and his wife, Sarah Probyne, by their warranty deed of that day, in writing, duly signed, acknowledged, and delivered, conveyed the said premises in dispute to the said cross-complainant, Theodore J. Moelle, but this defendant denies that the said cross-com-
27 plainant was from that time the owner or that by said deed he became the owner in fee of the said premises.

This defendant admits that on the 22nd day of August, 1882, L. P. Dosh procured a quitclaim deed of the said premises in dispute from the said George L. Bittenger, and that he caused the same to be spread upon the records of said Nuckolls county, and also that the said L. P. Dosh on the 17th day of October, 1882, procured from Ferdinand Furst and wife a quitclaim deed to said premises, conveying to said Dosh the tax title and claim procured by said Ferdinand Furst by tax deed dated November 21st, 1878, and recorded February 3rd, 1879, and that the said L. P. Dosh and wife, by warranty deed dated the 27th day of October, 1882, conveyed said premises to J. R. Dosh, and that the said deed was spread upon the records of Nuckolls county, in Book "H" of Deeds, at page 98, and that on January 3rd, 1883, said J. R. Dosh and wife made and executed and delivered a warranty deed of said premises to this defendant, and that the said deed was spread upon the records of said Nuckolls county, in Book "H," at page 433; but this defendant denies that he had anything to do with procuring the said quitclaim deeds to the said L. P. Dosh from the said Bittenger and Furst or either of them, or that he caused said deeds or either of them — spread upon the records of the said Nuckolls county, and he denies that said L. P. Dosh caused a deed from him to the said J. R. Dosh to be spread upon the records of said county, or that said J. R. Dosh caused the deed from him to this defendant to be spread upon the records of said county.

This defendant admits that the tax deed of date November 21, 1878, to said Ferdinand Furst was and is for various reasons void upon its face, and that it conveyed no valid title to
28 the said Ferdinand Furst.

This defendant denies that the taxes or any part thereof for

which said land was sold were or are invalid, but alleges that he and his grantors have paid a large amount of taxes upon said land, and that this defendant, if he were decreed not to have a valid title to said land, would be entitled to a lien thereupon for the taxes thus paid, with interest according to law.

Further answering, this defendant alleges that at the commencement of this suit he was and still is the owner in fee of the said premises, having purchased the same in good faith, for a valuable consideration, and without notice of any claim of title by the said cross-complainant or any other person, such purchase being evidenced by the warranty deed above mentioned and received from the said J. R. Dosh and wife to him, the said J. R. Dosh, at the time of the making, execution, and delivery of said deed, being the owner of the said premises through divers conveyances from the United States Government to the said George L. Bittenger and from him to the said L. P. Dosh and from the said L. P. Dosh and wife to the said J. R. Dosh, who purchased from the said L. P. Dosh in good faith, for a valuable consideration, and without notice of any claim of title to said premises by the said cross-complainant or any other person.

This defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said cross-bill charged; without this, that there is any other matter, cause, or thing in the said cross-bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or
29 denied is true to the knowledge or belief *to* this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

MONTGOMERY & JEFFREY,
Solicitors for Defendant.

C. S. MONTGOMERY, *Of Counsel.*

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 361, doc. 1. U. S. circuit court, district of Nebraska. Theodore J. Moelle *vs.* James K. O. Sherwood. Answer to cross-bill. Filed Oct. 28, 1887. Elmer D. Frank, clerk. Montgomery & Jeffrey, sol-. for defendant.

Thereupon, afterwards, to wit, on the 10th day of November, 1887, depositions were filed in said case; which said depositions are in words and figures following, to wit:

Depositions.

Depositions of sundry witnesses taken before me, Jno. Wallace, a notary public within and for the county of Fayette, in the State of Pennsylvania, on the fifth day of November, in the year 1887, between the hours of 9 o'clock a. m. and 2 o'clock p. m., at my office, in Brownsville, in said county, pursuant to the annexed notice, to be read in evidence in behalf of the defendant in an action pending in the circuit court of the United States for the district of Nebraska, in which James K. O. Sherwood is plaintiff and Theo. J. Moelle is defendant.

GUTHRIE PROBYNE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and saith as follows:

Interrogatories to be propounded to GUTHRIE PROBYNE.

29½ Int. 1. State your age, name, residence, and occupation.

—. Guthrie Probyne; sixty-four years old; I reside in Redstone township, Fayette Co., Penna.; my occupation is farming.

Int. 2. State if you are acquainted with one George L. Bittenger.

—. Yes; I am.

Int. 3. When did you first become acquainted with him?

—. In 1870.

Int. 4. I now hand you warranty deed, G. L. Bittenger and wife to Guthrie Probyne, bearing date the 23rd day of June, 1870, which deed is attached to deposition of Theodore J. Moelle as Exhibit "B" in the case of James K. O. Sherwood against Theodore J. Moelle in the United States circuit court for the district of Nebraska, and ask you to state whether or not you are the Guthrie Probyne therein named as grantee.

Ans. I am.

Int. 5. Calling your attention to the word east in the eight- line from bottom of first page of said deed and one on the seventh line and thirty-one in figures, in parenthesis, on the seventh line from the bottom of first page of said deed, I will ask you to state whether or not the word "east" and "one" and thirty-one ("31") in figures as aforesaid were written in said deed before the delivery thereof to you.

Ans. They were not. The change was made more than a year after.

Int. 6. If there was any change made before the delivery of the deed to you, state what the change was and how and under what circumstances and by whom the change was made.

Ans. There was no change made before the first delivery or at the time I gave my note. Bittenger took the deed back with

30 him to have it recorded. The purchase and giving my note for purchase-money was transacted in Pennsylvania, at my home. The deed was presented to me signed and acknowledged at that time. To the best of my recollection, the last quarter section

was written "southwest quarter of section thirty-two" instead of southeast quarter, as now written (section 31). When I went out to Nebraska in 1872 Bittinger said we did not have the description right in the deed, and he had compared it with the patent and would make it right, and he then changed it in my presence. He then delivered the deed to me, and I held it until I sold the land to Moelle.

Int. 7. State whether or not you paid G. L. Bittinger, the grantor in said deed, the consideration therein named and what you did with the deed after you received it.

Ans. I gave my note, payable in one year, for $1,800 at the time of the above purchase. Just before harvest in 1870 Bittenger took the deed with him and said he would have it recorded.

Int. 8. State who held the title to said premises from the time you received said deed from G. L. Bittenger to the time you made the conveyance to Theodore J. Moelle, defendant in this suit.

—. I held the title, except the last quarter section described in said deed, which I acquired by the change made in 1872.

Int. 9. State whether or not the said G. L. Bittenger, from the time the conveyance was made to you as aforesaid, has had any right, title, or interest in and to the premises described in said deed, and particularly in and to the southeast quarter of section thirty-one (31), township No. three (3), of range No. eight west, in Nuckolls county, Nebraska.

31 —. I acquired no title to S. E. ¼ sec. 31, t'p No. 3, of R. No. 8 W., until Oct., 1872, when I was in Nebraska. The rest of the land in said deed I held from the time above named in 1870, and Bittenger had no interest in it.

Int. 10. If you know any other matter or thing to the interest or advantage to the plaintiff or defendant in this suit please state it as fully and explicitly as if you had been particularly interrogated in relation thereto.

Cross-examination by D. M. HERTZOGG, attorney for plaintiff:

Int. Did you pay the $1,800 note you gave to Bittenger?

Ans. I paid it when it come due.

Q. To whom did you pay it?

Ans. I paid it in the bank at Latrobe, Pa., where I believe Bittenger had it discounted.

GUTHRIE PROBYNE.

I, Jno. Wallace, notary public, do hereby certify that Guthrie Probyne was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by myself in the presence of the witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and notarial seal.

[SEAL.] JNO. WALLACE,
Notary Public.

Notary fees	$2 50
Witness fees	1 00
	$3 50

Paid by Harwood, Ames and Kelly.

32 Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 361, 1. Rec'd & filed Nov. 10, 1887, and opened by order of court Nov. 18, '87. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 18th day of November, 1887, proofs were filed in said case; which said proofs are in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES K. O. SHERWOOD *vs.* THEODORE J. MOELLE. } No. 361, Docket, 1. In Equity.

On Saturday, October 1st, 1887, at the office of Messrs. Harwood, Ames and Kelly, attorneys-at-law, Lincoln, Nebraska, Oscar A. Mullon, examiner in chancery in and for the circuit court of the United States, district of Nebraska, being then and there present, and also Mr. C. S. Montgomery, solicitor for James K. O. Sherwood, complainant in the suit of James K. O. Sherwood *vs.* Theodore J. Moelle, and Mr. N. S. Harwood, solicitor for the respondent, Theodore J. Moelle, it was then and there stipulated and agreed by and between the above-named solicitors for the parties respectively, in the presence of the said Oscar A. Mullon, examiner in chancery, that the said examiner should then and there take in short-hand the depositions of Theodore J. Moelle, respondent, on his own behalf; also receive in evidence, subject to objections made, documentary evidence on the part of the above-named complainant and above-named respondents, the said examiner subsequently to reduce the deposition of the said Theodore J. Moelle to writing upon the typewriter, the signature of the witness to his said deposition being by the said solicitors for the complainant and respondent waived, and the
33 testimony and evidence thus taken by the examiner to be reported to the court, to be read on the hearing of said cause; whereupon I, the said examiner, in accordance with said stipulation and agreement, then and there, at the time and place stated, proceeded to take said testimony and documentary evidence, the witness, Theodore J. Moelle, before testifying, being by me duly sworn to testify in the said cause the truth, the whole truth, and nothing but the truth, and the said witness, being then examined on his own

behalf by Mr. Harwood and cross-examined by Mr. Montgomery, testified as follows in his deposition hereinafter set forth in accordance with the terms of the stipulation and reported to the court by the said examiner, the documentary evidence offered being filed by the examiner, and that forming a part of the deposition of the complainant being hereto attached at the end of the deposition and the documentary evidence for the complainant, with the objections thereto, following after the deposition of the respondent, as hereupon follows:

THEODORE J. MOELLE sworn & examined by HARWOOD:

Ques. 1. You are the defendant in this suit?
A. Yes, sir.
2. Where do you reside?
A. I reside in Nuckolls county, Nebraska.
3. What part of the county?
A. I am living on the southeast quarter of section 31, town. 3, range 8 west.
4. Is that the land in controversy in this suit?
A. Yes, sir.
5. How long have you resided there?
A. I resided there since the summer of '83.
6. You purchased that land?
A. Yes, sir.
34 7. From whom?
A. I bought it from a man of the name of Guthrie Probyne.
8. When?
A. In the summer of '83.
9. Is that the date mentioned in the instrument I hand you?
A. Yes; that is the date.
11. Is that the deed from Mr. Probyne to you?
A. Yes, sir.

HARWOOD: I offer in evidence deed from Guthrie Probyne to Theodore J. Moelle of the land in controversy, with the endorsements thereon.

No objection, and the deed was marked by the examiner Respondent's Exhibit "A," and the same is hereto attached, following this deposition.

12. At the time of your purchase what further evidence or muniments of title did the grantor, Mr. Probyne, turn over to you?
A. Before I bought his land he sent his original deed from his grantor, from George L. Bittenger to Probyne, dated in the year '70.
13. Is this the deed?
A. Yes; that is the deed. I also——

HARWOOD: I offer in evidence deed from George L. Bittenger to Guthrie Probyne to the land in controversy, with all the endorsements thereon.

MONTGOMERY: I object to this deed, because it appears upon its face that the description in the body has been changed so as to include the land in controversy.

Deed offered marked by the examiner Respondent's Exhibit "B," and the same is hereto attached, following this deposition.

14. What else were you saying?

A. I received at the same time when he sent that deed tax receipts from the year '71 to the year '76 describing all *the* these lands and some more assessed to the name of Guthrie Probyne.

35 15. Are these tax receipts referred to?

A. Yes, sir; there is three, four, or five.

HARWOOD: I offer in evidence the tax receipts identified by the witness.

Montgomery objected as immaterial.

The tax receipts offered (four in number) were marked by the examiner as Respondent's Exhibit "C," and are hereto attached, following this deposition.

16. What else did you receive?

A. I received them a little after the patent through his agent.

17. Patent from the United States to whom?

A. To George L. Bittenger to the whole of the section 31.

18. Is this the patent?

A. That is the patent.

19. Did you cause that to be recorded?

A. Yes, sir; it is recorded in "I" of Deeds, page 528.

HARWOOD: I offer in evidence patent to the land in controversy from the United States to George L. Bittenger.

No objection, and the patent offered was marked by the examiner as Respondent's Exhibit "D," and is hereto attached, following this deposition.

20. How soon after you received these deeds did you go into possession of these premises?

A. I was negotiating for this land some time—some time in April or May before; I had the money ready and everything, and when he sent me the deeds it was August, I think. In the same month—anyhow maybe next month, September—I owned there a house, a log house, on another piece of land I had near, and moved it

36 there. It was built to live in or use for a stable. In the spring of '84, about the 8th or 10th day of April, I had my team employed there to break out 55 acres of prairie.

21. When did you move on the land?

A. I moved on the land—I builded a frame house in August, '84, and moved right in before it was finished with my family, and it has been my homestead since that time.

22. How much of a house did you build?

A. I built a house 16 by 22 and wing 14 by 16, a story and a half

high. The whole house is there, finished to the bottom up, cellar and everything complete.

23. What else have you done?

A. I have there an orchard, planted out in the spring and some of it in the fall of '84 and some in the spring of '85; an orchard — may cover six acres and maybe a little more; of all kinds of fruit trees; of all varieties. There are 400 grape vines there; there are about 276 apple trees, 31 pear trees, 18 plum, 16 peaches, and, I think, 12 cherries, and 3 apricots, and I planted in May 100 or 125 evergreens, and then there are a thousand Russian mulberry, and between 7 and 8,000 eastern cotton-woods and poplar, a thousand ash, 300 catalpa speciosa, 300 walnut, and I don't hardly know how to count, but say a thousand (I think more) of box elder, some birches, European birch, mountain ash, and I cannot mention everything, but a variety of all kinds of trees.

24. Are any of your fruit trees imported trees?

A. I imported twice myself from Germany in the fall of '84 and '85—imported from Germany apple trees and plum trees and pear trees, gooseberry and currant. I imported them from Germany myself, and they are all growing on that place there.
37 Then I erected a Halliday windmill, and I have got another well—two wells altogether there—and I have got pasture, with wire fence, of 26 acres on the place. I have got other things—two big horse stables, one of frame and one of log, all built upon rock foundation. I have a granary, ten by twenty, and a frame cow stable, I think, sixteen by twenty, and other outhouses, and there are 95 acres broke and in cultivation.

25. You may state, if you know, what about the improvements altogether are worth.

Montgomery objected as immaterial at this time and irrelevant for the reason that we cannot try the value of the improvements and the right to recover for the same at this stage of the case.

A. I will figure the house $1,000, perhaps more—the whole building—and the other improvements—my small fruits and all extra in the yard and orchard and all improvements—say $1,500.

26. At the time you made this purchase what efforts did you make to ascertain the true source of the title to the premises in question?

Montgomery objected as immaterial.

A. When Mr. Probyne sent me the deed I seen it was recorded in the county, and the county clerk of Nuckolls county recorded it in Nuckolls county. It was recorded in Jefferson county.

27. You had it recorded in Nuckolls county when you got it?

A. Yes; may before or at the same time; I don't know which.

28. In January, 1871, what county was it recorded in?

A. In Jefferson county, before Nuckolls county was organized; I believe August or September, '71.

29. Did you ever examine the records of Jefferson county?

A. No, sir.

38 30. Did you ever take any other steps to ascertain whether Bittenger had any title to the premises?

Montgomery objected as immaterial.

A. In the first place, I had seen that Probyne had paid the taxes on it to his name up to '76, and besides he sent me an affidavit that he had never conveyed back to Bittenger, and also I received a letter—a postal card from Bittenger——

MONTGOMERY: I object to his stating the contents of a letter as incompetent.

A. cont'd. Where Bittenger states he sold the land to Guthrie Probyne.

Cross-examined by MONTGOMERY:

31. You stated, as I understood, you had resided on the land since the summer of '83. You don't mean that, do you?

A. No, sir; I meant that I took possession of the land in '83, because I moved the house on.

32. That is when you moved the house on?

A. I moved the house on; yes.

33. When you moved the house on the land was there any cultivation on the land?

A. No, sir; nothing.

34. It was wild prairie, uncultivated?

A. It was wild prairie.

35. Prairie land?

A. Yes, sir.

36. Was that the condition when you got this deed from Probyne August 24, '83?

A. Yes; he knew very well enough it was wild prairie.

37. It was the case at that time?

A. Yes, sir.

38. You moved the house right on after getting the deed?

A. Yes.

39. When you got that deed and moved the house on you knew right well that the plaintiff, Mr. Sherwood, claimed to be the owner of the land?

A. No, sir; not till two years after.

39 40. You knew that the land had been deeded by Bittinger to L. P. Dosh?

Harwood objected as irrelevant and immaterial.

A. So far as I knew I only knew that Dosh bought on a tax deed, but still I did not know whether it was before or after. At any rate some time that year I saw that Bittinger gave a quitclaim deed to Dosh and I knew by testimony that Bittinger had played fraud after he had deeded away the land before.

41. What do you mean when you say that; what year was that?

A. That was—let me see—I have not looked over the abstracts

and nothing else for a good many years and so I don't know whether it was '83, spring, or winter of '82. I cannot say now, because I did not look over the records.

42. Your memory is very defective there?

A. I don't know. I don't think it is.

43. In reference to the time you got your deed from Probyne—answer directly—did you not know that L. P. Dosh had a deed to that land on record in Nuckolls county from George L. Bittenger and wife?

A. I don't think I did know that.

44. Will you swear positively you did not know?

A. No; I will say it is so many years since——

MONTGOMERY: Wait a moment. Will you swear you did not know?

Harwood objected as irrelevant.

A. I don't think I did know.

45. When you bought this land and took a deed from Probyne did you examine the record in Nuckolls county as to the title to this land?

Harwood objected as irrelevant and immaterial.

A. I never did till after, some time, when I found out that Dosh had a quitclaim deed. I took it for granted as the deed
40 filed and recorded in Jefferson and recorded again in Nuckolls county. I took that for good, but when I heard of the other conveyance——

46. Answer my question. When you bought this land did you or not examine the records of Nuckolls county in respect to the title to this land?

Harwood objected as irrelevant and immaterial.

A. When I bought the land there was nothing on the land at that time; I don't remember.

47. You did not look at the record at that time?

A. As I remember it, there was only a tax deed on and a patent—no; not a patent—and a deed from Bittenger to Probyne. That is what there was.

48. Did you examine the records at the time you bought this land from Probyne?

A. No, sir.

49. You did not?

A. I don't think I did.

50. You did not look to see what the record of the title was at all in Nuckolls county?

A. I only——

MONTGOMERY: Wait; answer that question.

A. I don't think I did.

51. You did not know anything, then, about this deed from George L. Bittenger to L. P. Dosh about that time?

Harwood objected as irrelevent and immaterial.

A. I don't remember if it was found out before or after.

52. Don't you know that the deed from Probyne to Dosh had been on record for eleven months when you got your deed from Probyne?

Harwood objected as irrelevant and immaterial.

A. Probyne never conveyed to Dosh.

MONTGOMERY: Read the question.

Question read by examiner.

MONTGOMERY: I change the question. Did not you know that the deed from Bittenger to Dosh had been on record eleven
41 months when you got your deed from Probyne?

A. (cont'd). I don't believe I did know. It may be, but then I have never looked over the record since, you know.

53. You knew about the tax deed to Ferdinand Furst?

A. Yes, sir.

54. Did you know that L. P. Dosh had a quitclaim deed from Ferdinand Furst and his wife?

A. I think it is just about the same time when I bought this land that Furst conveyed to Dosh; that is my belief.

55. Did you know at the time you bought the land?

A. I cannot say that, but my impression is that Furst filed that deed at the same time that I filed; that is my impression.

56. Did you know it before you got your deed?

A. Now, that is the amount of what I can answer.

57. Answer it the best you can.

A. I have stated it here that it is about the same time, either before or after.

58. When you bought this land did you not know that L. P. Dosh and wife had given a warranty deed of the land to J. R. Dosh?

Harwood objected as irrelevant and immaterial.

A. No; I believe it was the way I say.

59. Did you not know that he had already conveyed—Dosh and his wife—to J. R. Dosh?

A. No; I don't believe——

60. Did you not know when you bought this land and took your deed from Probyne that a warranty deed from L. P. Dosh and wife to this land to J. R. Dosh had been on record for ten months?

Harwood objected as irrelevant and immaterial.

A. I didn't know. I had employed an attorney in Nelson to look this up.

61. You moved the house on the land immediately after you got your deed from Probyne?

42 A. No; I moved it out just when I got the deed; maybe a week or so after.

62. You did not do any breaking, as I understand, until April, '84?

A. April, '84—8th or 10th. It was a week before Easter. Easter was the 16th, I believe, and I believe it was about the 8th or 10th.

63. Did you build another house on the land that year other than the one you moved on?

A. Yes; I used that for a stable, and built a big frame house.

64. You moved on that in August, '84?

A. Yes; about August, '84.

65. And lived there ever since?

A. Yes, sir.

66. Do you own land around this?

A. I own other land adjoining this. I own——

67. Were you living on that quarter before you bought this?

A. No, sir; I was living in Nelson.

68. Nelson was the county-seat of Nuckolls county, was it not?

A. Yes; I went to Europe in '84.

69. What public office did you hold in Nuckolls county in 1882?

Harwood objected as irrelevant and immaterial.

A. I was the deputy county clerk. We employed at that time in the office one or two clerks more besides.

70. Did you ever meet L. P. Dosh?

A. I don't know whether L. P. I cannot say.

71. Did you meet a Mr. Dosh?

A. I met a Mr. Dosh some time in the summer at Nelson; they asked me if I knew that land. I said, yes, I did.

72. What year was that?

A. I don't know.

73. Was it that year or after?

A. I cannot say; I met so many.

43 74. Was it before or after you bought the land?

Harwood objected as irrelevant and immaterial and not proper cross-examination.

A. No, sir; he told me it cost him $100 to get the address of Bittenger; that is what he told me, but he never told me he bought it.

75. Did he tell you where he got the address?

A. I don't know; I know he told me it cost him $100.

76. Did he tell you he got it out in Pennsylvania?

A. No; he never told me that.

77. Did he not tell you about trying to get the land?

A. No, sir; not the least.

78. Did he have a tax title at that time?

A. No, sir.

79. How did he come to talk to you about the land?

Harwood objected as immaterial.

A. I have lived around Nuckolls county ten years, and know every bit of land in Nuckolls, so he asked me if I knew the land.

80. Did he say where Bittenger was?

A. No.

81. How came he to tell you it cost him $100 for the address of Bittenger?

A. I do not know; he told me that in conversation.

82. Speaking about these improvements that you have made upon the property, or all these trees and all these shrubs, you say they are growing well—all that you planted there?

A. Yes, sir; they do first rate. I am told by men in Nuckolls county they are the nicest growing trees they ever seen.

83. Everything is in the best shape?

A. Yes, sir; you would be surprised to look at them.

84. You said that Probyne sent you his deed from Bittenger before you bought it?

A. Yes; before I bought it.

44 85. You saw there on the endorsement that it had been recorded in Jefferson county?

A. Yes, sir.

86. You did not look to see whether there was any other record of any other title in Nuckolls?

A. At this time I didn't know much about these records; I did not know at that time that records kept in Jefferson were brought to Nuckolls.

87. I am talking about Nuckolls county. You did not look at the records in Nuckolls?

A. No.

88. You were deputy county clerk?

A. Deputy.

89. Still deputy county clerk when you bought this land of Probyne?

A. Yes, sir.

90. Did you have this deed which you have offered in evidence as Exhibit "B," from Bittenger to Probyne, recorded in Nuckolls county, as shown by the endorsement on it?

A. It is not my writing.

91. Did you file it for record yourself?

A. No, sir; Probyne did; I did not.

92. Was Probyne there?

A. No, sir; he sent the deed for record.

93. He sent it — you for record?

A. Yes, sir.

94. You did file it for record yourself?

A. No; I think it was before I agreed to buy the land. He wrote this way: If the deed did not show in Nuckolls county to have it recorded.

95. You had it recorded?

A. I settled with him $1.50 for recording that deed. I paid that money.

96. You personally filed it for record?

A. No, sir; it was sent by mail from Probyne to the county clerk.

45 97. To you?

A. No, sir.

98. Was the letter written to the county clerk?

A. To the county clerk, J. P. Hammond.

99. When this was sent there for record you had not yet bought it of Probyne?

A. No; I don't know it was on, but I think the deed was on record before I bought it.

100. Where did Pobyne live?

WITNESS: Must I answer that question?

MONTGOMERY: Certainly you must.

HARWOOD: That is all right.

101. Where did Probyne live?

A. At Fort Wayne, Indiana.

102. Did you ever see him?

A. No, sir.

103. Then your deal with Probyne was made by correspondence, by letter?

A. Yes, sir.

104. Did you ever see this deed from Bittenger to Probyne before it was recorded?

A. No; I did not file the deed; Hammond filed the deed. It was recorded by another scribe in the office. I did not record the deed; I know that.

105. Referring to the other deed by Probyne to you (A), is the consideration expressed in that deed, $200, just the amount paid?

A. No; I paid $300. The consideration says $200. I mentioned before I had written to Probyne to send that deed to the bank at Nelson, and I had deposited the money. Instead of that the sent the deed to Fowler & Co., and I went and inquired for the deed. After four weeks—for I was looking for the deed to the bank—I wrote to Probyne for the deed. He said he had not got
46 it; he had sent it three or four weeks ago to Fowler. I went to Fowler for the deed. He said he had not got it. I had been threatening him. He said, Mr. Moelle, I have a buyer for that land and I want to send off for a deed. This deed—he said, "If I deliver this deed to you, then another party would come on for it." I told Mr. Fowler I bought that land without any agent and you are authorized by Probyne to give me that deed, deliver me the deed, and Fowler refused and said, "I sent that deed back to Probyne." I telegraphed back to Probyne and Probyne wrote me back that Fowler had offered—don't know—$250 or $275 more. I wrote Probyne and said if they had offered $75 more I would raise him $25.

That is the way that happened. Fowler tried to beat me out of that. I told him to send that to the bank at Nelson. He sent it. Then I got that deed from the bank at Nelson and paid the money.

106. Who wrote that date in there just before the signature?

A. I didn't. The body of the deed is my writing—not all of it.

107. Then you had bought this land or had agreed on a purchase of the land for $200 with Probyne several weeks before you got your deed?

A. Yes, sir.

108. Who made this change in the description in the body of this deed from Bittenger to Probyne, putting in the word "east" and the word "one" and the figure- "31," so as to make it read the southeas quarter of section 31?

HARWOOD: Objected to, first, because it does not appear that the deed has ever been charged, and, second, as irrelevant and immaterial.

A. There is no change.

109. Who made that change?

A. I never. The deed is just so as it appeared when first
47 I received it.

110. Then you don't know who did make the change?

A. No.

By HARWOOD:

111. You don't know that any change was made?

A. No, sir; I don't know nothing about it.

112. Then you did receive this deed?

A. Through the county clerk.

113. You swear positively that Probyne did not send this deed to you personally?

A. No, sir. I——

MONTGOMERY: Wait a minute. You say that Probyne did not send this deed to you personally?

Harwood objected as immaterial.

A. He sent the deed to the county clerk. Once in-while I opened letters and he did. I was in the office and had as much right to open letters as he if they were not marked private; so I don't know nothing about it.

114. You have sworn that this deed was sent to the county clerk for record before you bought the land, and you have sworn you bought this land a few days before you received this deed from Probyne to yourself. The deed from Probyne to you is dated the 24th of August, and the deed from Bittenger to Probyne is recorded the 20th of August. Now state whether or not all you have stated is just as much a fact as that.

A. Now, this deed——

115. State whether or not what you have sworn to is exactly the facts.

A. This deed——

MONTGOMERY: Answer that question.

A. cont'd: I don't know what you say, particularly. The filing shows when it was filed. It is filed the 20th of August; this old deed from Bittenger to Probyne must be filed before that one.

116. But you have sworn you bought this land several
48 weeks before it was recorded.

A. I agreed on the purchase price, but the trouble with the money arose, and it took a little after, you know.

117. Then you had bought this land before you had ever seen the deed from Bittenger to Probyne?

A. No, sir; I had not; only kind of agreeing on the price.

118. You had agreed upon the price of $200, had not you, before you ever saw the deed of Bittenger to Probyne?

A. I believe he told me he had a farm and his price was $200, and finally he sent on that deed to record, as I told you, before the trouble, and when that came, then he sent on the other deed.

119. You wrote this deed from Probyne to yourself—the body of it?

A. Yes, sir.

120. And you sent that on several weeks before you actually got it?

A. Several weeks—you may call it two or three weeks.

121. Then you never had seen this deed from Bittenger to Probyne when you wrote this deed from Probyne to yourself?

A. No; I don't think I ever seen that deed. I don't know but——

122. You cannot remember now *eh*ther Probyne ever sent this deed from Bittenger to you?

A. It was sent to the county clerk.

123. When it was sent for record?

A. When it was sent for record.

124. And never ever before, so far as you know?

A. Never.

125. And you never saw it till after it was filed for record?

A. Yes, sir; Hommand told me when he filed the deed. He said, Here is a deed. He says it was filed right.

126. (Showing witness a paper:) Is that your handwriting?

A. Yes, sir.

49 127. Is that you- signature?

A. Yes, sir.

128. Is that—this lead pencil—your handwriting and your signature?

A. Yes, sir; it is my writing.

At the request of Mr. Montgomery the examiner marked the writing this identified by the witness, at the top and bottom thereof and on each side, by the mark * * * *

MONTGOMERY: I offer this deed in evidence, together with the writing identified by the witness on the back of the deed.

HARWOOD: I object as irrelevant and immaterial and as improper cross-examination, and for the reason that the grantor in said deed never had any title to convey.

The paper was marked Exhibit "E," and the same follows the deposition.

129. When did you cease to be deputy clerk of Nuckolls county?

A. In the fall of '83.

130. When did you commence to be deputy?

A. Some time in '80. I cannot tell when; maybe in '81.

131. You were deputy county clerk two terms?

A. Two terms—that is, he employed a few others before me. When I came in I don't know; whether '81 or '82.

132. Did you serve to the end of the county clerk's term in '83?

A. Yes.

133. That was ended in '84?

A. No, sir; '83.

134. You quit that position then?

A. Yes.

135. When in that position were you also dealing in real estate?

A. Not in that time. I bought and sold pieces, but did not claim to be agent.

136. You bought and sold here and there a piece, but did not claim to be a regular agent?

A. Not as regular agent.

137. Did you not then commence to be agent?

50 A. I got no one to be agent for, but I sold land for other parties.

138. You bought this land without examining the records yourself in Nuckolls county?

A. Not as I know; only as to the tax deed and the deed to Probyne, so far as I remember; I saw recorded too many that I cannot remember all that.

139. In this deed from Bittenger to Dosh—referring to the writing which you said is in your hand; the lead-pencil part of it—you say, "You made it. Yours, Theo. J. Moelle, deputy." What do you mean by that?

A. I don't know.

140. Having this paper before you now, cannot you recollect that you referred to a conversation with Mr. Dosh, in which he told you he was going to buy this land of Bittenger?

A. No, sir; I think it refers to the fee he paid; nothing else; that he had sent it all right.

141. You think "you made it" refers to the fees he paid for the recording of the deed?

A. Yes, sir; I think so.

142. What do you base your calculation upon when you state that the value of your improvements are about $2,500?

A. Now, I will figure my work for over three years, almost four; I figure the bills paid for fruit trees—the prices paid for these things; I know what the fense cost me with hired labor, and I know how much it takes to fix fence posts and dig holes, and dig out holes with the spade and put trees in; dig holes so that every tree shall have four to six feet round.

143. These fruit trees and buildings did not cost you in money $2,500?

A. Not all in money.

144. You figures in the labor?

A. I figures what the trees cost me sitting there; solid and healthy trees.

51 145. The house is not now worth what it cost you?

A. Yes; I think it will be worth that now, no question; it cost me a couple of hundreds.

146. Have you paid any taxes on this land since you bought it?

A. Yes, sir.

147. Do you remember for what year you paid taxes?

A. No; I don't; I paid once or twice. When I stepped into the office to pay again I was told it had been paid, and if I go and pay taxes on your land perhaps you would have no objection to it. I paid a couple of times, I know.

148. Did you pay '86?

A. No; I been in the office last week to pay. It is not paid.

149. Pay '85?

A. I believe I did '85; '84 I cannot say.

150. You have got your receipts with you?

A. No; because I came unexpected.

151. Did you pay '84?

A. I cannot say. I only know I paid it once or twice; that is all I know.

152. Did you pay '83? That is the year you got the deed.

A. I only swear this: I have been in the office to pay the taxes before; we had time to pay till the first Monday in November, and I have been in every year in time to pay the taxes and the treasurer told me they were paid.

153. Will you swear you paid any taxes on that land?

A. Yes, sir.

154. Since you bought it?

A. Yes, sir.

155. You cannot say for what years?

A. No; I don't.

156. Can you recollect whether they were for the years levied prior to your purchase or years since?

A. I know—I swear '84 or '85; maybe both years.

157. You paid no taxes levied prior to the time you bought it?

A. I paid the taxes for that year when I bought the land, '83. I paid taxes of '82, I guess.

52 158. '82?

A. Yes; I feel quite sure now.

159. Did you do anything in '83 besides building the house?

A. In '83 I went up—we had a surveyor and surveyed the land—that is, rode about the land.

160. Did you put any improvements on?

A. Put a house and stakes on.

161. Your first improvement was in breaking—was in '84?

A. In April, '84.

162. Did you do anything else in '84 besides breaking?

A. I builded a frame house on and a well I made. I built two stables that year and I built a granary that year. I planted that year out already three or four acres of orchard—right that year.

163. Had you been to Europe at that time?

A. I had been to Europe in '84.

164. What time in '84?

A. I left in April and came back July 26th.

165. After you returned you put in the orchard?

A. In the fall it was broke; then I put out the orchard.

166. That is about all you did in '84. What did you do in '85?

A. In '84 I had breaking done; in '84 I built a frame house and made a well, two stables, in '84, and built a granary in '84 and made an orchard in '84.

167. How much of an orchard?

A. About three acres that first year.

168. Was not one of the stables moved in '83?

A. I finished that up. It was moved up in '83 and logs put to rest it on. When I moved up in '84 I finished it.

169. What did you do in '85?

A. I broke 20 or 25 acres.

170. In the spring?

53 A. Yes; in the breaking season, and extended my orchard—put out 400 grapevines and extended my orchard.

171. When did you put out grapevines that year?

A. I put them out in the spring of '85.

172. About what month do you suppose?

A. March or April, according to season.

173. When did you extend your orchard?

A. The same season.

174. How much of an extension did you make?

A. I made that year an extension of six rows and eighteen trees in a row.

175. How many grapevines did you put out?

A. 400.

176. That is all you did that spring in the way of improvements?

A. I planted that spring 2,000 cotton-wood trees from Bloomington, Illinois, and the mulberry I planted, I guess, in '85—a thousand Russian mulberry.

177. Anything else?

A. The improvements I planted out is trees and built an addition to my stable—my frame stable.

178. Was that all before this case was commenced?

A. Yes; all before it.

179. The rest of your improvements you put out later?

A. The latest improvements there is the windmill and addition to my house.

180. How about the fence?

A. The fence I put out last fall.

Re-examined by Mr. HARWOOD:

181. I misunderstood you on a question you answered, or you said in your cross-examination that Probyne lived in Fort Wayne, Indiana. Do you mean that?

A. No, sir; I meant George L. Bittenger.

54 182. Where does Probyne live?

A. He lives at Brownsville, Fayette county, Pennsylvania.

183. Do you know Mr. Probyne's handwriting?

A. Yes, sir.

184. Is that (paper produced) his handwriting?

A. Yes; that is his handwriting.

185. Is that letter in reference to your negotiations with him?

A. Yes, sir.

Harwood offered the paper in evidence; no objection; and the same was marked Exhibit "F" and is attached hereto.

186. Did you purchase land prior to that time of Probyne?

A. Yes, sir.

187. Was that the reason you happened to ascertain he was owner of the title to the land in question?

A. Yes; he wrote me that the southeast of 31, 3, 8, is for sale; that is what the letter says. Then I purchased it.

188. In addition to the $300 you spoke of that you paid for the land in controversy, did you assume or agree to pay anything further.

A. No; I assumed the taxes on the land.

Witness excused, and the signing of the deposition waived by the consent of both parties.

The Exhibits "A" to "F" hereupon follow, the paper marked Exhibit "E" being put in evidence on the part of the complainant during the cross-examination of the respondent in his preceding deposition.

O. A. M., *Examiner.*

55 EXHIBIT A.

Know all men by these presents that *I*, Guthrie Probyne and Sarah Probyne, husband and wife, of the county of Fayette and State of Pennsylvania, for and in consideration of the sum of two hundred ($200) dollars in hand paid, do hereby grant, bargain, sell, convey, and confirm unto Theodore J. Moelle, of the county of Nuckolls and State of Nebraska, the following-described real estate, situate in Nuckolls county and State of Nebraska, to wit: The southeast quarter of section No. thirty-one (31), in township No. three (3) north, of range No. eight (8) west, of 6th P. M., subject, however, to all tax deeds and all back taxes; and I do hereby covenant with the said Theodore J. Moelle and his heirs and assigns that I am lawfully seized of said premises; that they are free from incumbrance except taxes and tax deed; that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever except as above set forth.

And the said Sarah Probyne hereby relinquishes all her right of dower in and to the above-described premises.

Signed this twenty-fourth day of August, A. D. 1883.

GUTHRIE PROBYNE.
SARAH PROBYNE.

In presence of—
HARRY P. STITZELL.
JNO. WALLACE.

(Sherwood *vs.* Moelle. Respondent's Exhibit "A." O. A. M., examiner.)

THE STATE OF PENNSYLVANIA, } *ss:*
Fayette County, }

On this twenty-fourth day of August, A. D. 1883, before me, Jno. Wallace, a notary public, duly commissioned and qualified, for
55½ and residing in said county, personally came Guthrie Probyne and Sarah Probyne, his wife, to me known to be the identical persons described in and who executed the foregoing conveyance as grantors, and acknowledged the said instrument to be their voluntary act and deed.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] JNO. WALLACE,
Notary Public.

(Endorsed:) Warranty deed from Guthrie Probyne and W. to Theodore J. Moelle. State of Nebraska, Nuckolls county. Entered on numerical index and filed for record in the clerk's office of said county the 28th day of August, 1883, at 1 o'clock — minutes p. m., and recorded in Book I of Deeds, on page 204. J. P. Hammond, county clerk. Se. 31, 3, 8. August 24, 1883.

No. 308.

Tax Receipt.

COUNTY TREASURER'S OFFICE, NUCKOLLS COUNTY, NEBRASKA, *October* 16, 1872.

Received of Guthrie Probine forty-eight $\frac{46}{100}$ dollars in full for the following taxes levied for the year 1876:

Description.	Sec. or lot.	Tp or blk.	Rng.	Acres.	Value.	State taxes.						County taxes.																		Interest and penalty.	Advertising.	Total.
						General.	Sinking.	School.	Normal school.	Penity.	State bonds.	General.		Sinking.	Road.		Poll.			School bonds.			Bridge bonds.		Special bridge.		Jail tax.					
												Paid in cash.	Paid in war'nts.	Paid in cash.	Paid in cash.	Paid in war'nts.	Paid in cash.	Paid in war'nts.	Dog.	Co. school.	Int.	Sink'g.	No. of dist.	Int.	Sink'g.	Cash.	War'nts.	Cash.	War'nts.			
S. E. ¼	31	3	8	.....	500	1 25	50	1 00	25	.....	.....	3 00	.....	25	4 00	.....	.....	.....	...	1 00	.....	.....	...	.....	.....	.....	...	...	...	68	25	12 18
S. W. ¼	32	3	8	160	500	1 25	50	1 00	25	.....	.....	3 00	.....	25	4 00	.....	.....	.....	...	1 00	.....	.....	...	.....	.....	.....	...	...	...	68	25	12 18
W. ½	23	2	8	320	1,000	2 50	1 00	2 00	50	.....	.....	6 00	.....	50	8 00	.....	.....	.....	...	2 00	.....	.....	...	.....	.....	.....	...	...	...	1 35	25	24 10

$48.46.

Sherwood *vs.* Moelle. 4 tax receipts. Respondent's Exhibits "C." O. A. M., examiner. (S'g'd)

G. D. FOLLMER, *Treasurer.*

57 No. 374.

STATE OF NEBRASKA, } *ss:*
Nuckolls County, }

Tax Receipt.

COUNTY TREASURER'S OFFICE, NUCKOLLS COUNTY, NEBRASKA, *June 23d*, 1873.

Received of G. Probyne thirty-five and $\frac{59}{100}$ dollars in full for the following taxes levied for the year 1872:

Description.	Sec. or lot.	Tp or blk.	Rng.	Acres.	Value.	State taxes.						County taxes.																		Interest and penalty.	Advertising.	Total.
						General.	Sinking.	School.	Uni.	Penity.	State bonds.	General.		Sinking.	Road.		Poll.			District school.	School bonds.			Bridge bonds.		Special bridge.		Jail tax.					
												Paid in cash.	Paid in war'nts.	Paid in cash.	Paid in cash.	Paid in war'nts.	Paid in cash.	Paid in war'nts.	Dog.		Int.	Sink'g.	No. of dist.	Int.	Sink'g.	Special bridge.		Cash.	War'nts.			
S. E. ¼	31	3	8	.....	409	1 03	41	82	10	.....	.....	2 45	.....	21	4 00	.....	.....	.....	...	5 31	.....	.....	...	.....	.....	2 04	...	...	...	33	.....	16 70
S. W. ¼	32	3	8	160	489	1 20	48	96	12	.....	.....	2 88	.....	24	4 00	.....	.....	.....	...	6 24	.....	.....	...	.....	.....	2 40	...	...	...	37	.....	18 89

$35.59.

(S'g'd) G. D. FOLLMER, *Treasurer.*

58 No. 579. *Tax Receipt.*

STATE OF NEBRASKA, } ss:
Nuckolls County, }

COUNTY TREASURER'S OFFICE, NUCKOLLS COUNTY, NEBRASKA, *Feb. 7th*, 1876.

Received of Guthrie Probyne, Esq., sixty-nine and $\frac{72}{100}$ dollars in full for the following taxes levied for the year 1873:

Description.	Sec. or lot.	Tp or b'k.	Rng.	Acres.	Value.	State taxes.						County taxes.																								Interest and penalty.	Advertising.	Total.
												General.		Sinking.	Road.		Poll.			District school.	School bonds.		No. of dist.	Bridge bonds.		Special bridge.	Jail tax.											
						General.	Sinking	School.	Univ'ty.	Penit'y.	State bo'nd's.	Paid in cash.	Paid in warrants.	Paid in cash.	Paid in cash.	Paid in warrants.	Paid in cash.	Paid in warrants.	Dog.		Int.	Sink'g.		Int.	Sink'g.		cash.	Warrants											
N. W. ¼	23	2	8	160	360	90	36	72	09	18	.....	.....	2 16	09	4 00	.....	.....	.....	...	4 68	.....	.....	...	.....	.....	1 80	...	...	3 30	20	18 48							
S. W. ¼	"	"	8	160	360	90	36	72	09	18	.....	.....	2 16	09	4 00	.....	.....	.....	...	4 68	.....	.....	...	.....	.....	1 80	...	...	3 30	20	18 48							
S. E. ¼	31	3	8	160	320	80	32	64	08	16	.....	.....	1 92	08	4 00	.....	.....	.....	...	4 48	.....	.....	...	.....	.....	1 60	...	...	2 10	20	16 38							
S. W. ¼	32	3	"	160	320	80	32	64	08	16	.....	.....	1 92	08	4 00	.....	.....	.....	...	4 48	.....	.....	...	.....	.....	1 60	...	...	2 10	20	16 38							
						$3 40	$1 36	$2 72	34c.	68c.	.....	.....	$8 16	34	$16 00	.....	.....	.....	...	$18 32	.....	.....	...	.....	.....	$6 80	...	...	$10 80	80	$69 72							

$69.72.

(S'g'd) G. D. FOLLMER, *Treasurer.*

59 $74.86. Treasurer's office, Nuckolls county, Neb. No. 594.

2, 7, 1876.

Received of Gurthre Probyne seventy-four and $\frac{86}{100}$ dollars in full of the following taxes for the year 1874 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
N. W. ¼	23	2	8	160	State general fund	3 93			
S. W. ¼	"	"	"	"	State sinking fund	1 57			
S. E. ¼	31	3	"	"	State school fund	3 13			
S. W. ¼	32	"	"	"	State university fund	40			
					State penitentiary	80			
					County gen'l fund		9 39		
					County spec'l sinking fund.				
					Co. skg. R.R. bond fund.				
					Co. skg. R. R. bridge bond.				
					Road land	16 00			
					Int. on bridge bonds	5 60			
					Poor fund				
					Dist. school	18 66			
					Poll				
					S. bridge		7 83		
								6 75	
					Advertising	80			
					Total	50 89	17 22	6 75	74 86

(S'g'd) G. D. FOLLMER, *Treasurer.*

60 THE UNITED STATES OF AMERICA:

Examined. Certificate No. 3556.

To all to whom these presents shall come, Greeting:

Whereas George L. Bittinger, of Otoe county, Nebraska, has deposited in the General Land Office of the United States a certificate of the register of the land office at Beatrice, Nebraska, whereby it appears that full payment has been made by the said George L. Bittinger according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of the public lands," for all of section thirty-one, in township three, of range eight west, in the district of lands subject to sale at Beatrice, Nebraska, containing five hundred and ninety-four acres and thirty-six hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said George L. Bittinger:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said George L. Bittinger and to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatever nature, thereunto belonging, unto the said George L. Bittinger and to his heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United

States of America, have caused these letters to be made patent
61 and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

By the President:

U. S. GRANT,
[SEAL.] By J. PARRISH, *Sec'y.*

Recorded vol. 6, page 456.

C. B. BRYNTON,
Recorder of the General Land Office.

(Sherwood *vs.* Moelle. Respondent's Exhibit D. O. A. M., examiner.)

Endorsed: No. 1. Entered on numerical index & filed for record December 31, 1883, at 10 a. m., and duly recorded in Book I of Deeds, at page 528. J. P. Hammond, cl'k. Theo. J. Moelle, dep'y.

COMPLAINANT'S EXHIBIT E. Put in Evidence on Cross-examination of Respondent. O. A. M., Examiner.

For the consideration of thirteen hundred and fifty dollars in hand paid by L. P. Dosh we do hereby sell and convey and quit-claim to said L. P. Dosh all the right, title, and interest we have in and to the following real estate, situated in Nuckolls county, Nebraska, to wit: The southeast quarter and the southeast quarter of the southwest quarter of section twenty (20), the west half and the southeast quarter of section thirty-one (31), and the southwest quarter of section thirty-two (32), township three (3), range eight (8), hereby releasing right of dower and homestead which either of us may possess in said land.

Witness our hand this 17 day of Oct., 1882.

FERDINAND FURST.
SUSAN A. FURST.

Attest: J. M. MOOR.

62 STATE OF IOWA, }
Adams County. }

On this 17th day of Oct., 1882, before the undersigned, a notary public within and for said county, personally came Susan A. Furst, to me personally known to be the identical person who executed the above deed as wife of F. Furst, and acknowledged the execution thereof to be her voluntary act and deed.

Witness my hand and notarial seal the day and year first above written.

JAMES M. MOOR,
Notary Public.

STATE OF IOWA, }
Scott County. }

On this 23rd day of Oct., 1882, before me, a notary public in and for sain county, personally appeared Ferdinand Furst, to me personally known to be the identical person whose name is affixed to the foregoing deed as grantor, and acknowledged the execution thereof to be his voluntary act and deed.

Witness my hand and notarial seal the day and year above written.

[SEAL.] CHARLES H. KENT,
Notary Public, Scott Co., Io.

Endorsed: Ferdinand Furst & wife to L. P. Dosh. State of Nebraska, Nuckolls county. Entered on numerical index and filed for record Oct. 26, 1882, at 11 a. m., & recorded — Book H of Deeds, page 98. J. P. Hammond, Co. cl'k. Theo. J. Moelle, dep. You made it. Yours, Theo. J. Moelle, dep.

RESPONDENT'S EXHIBIT "F." O. A. M., Examiner.

SHERWOOD }
vs.
MOELLE. }

BROWNVILLE, *Apr. 9th*, 1883.

Mr. Theo. J. Moelle.

SIR: In answer to your letter the S. W. ¼ 32, 3, 8 is for sale at $1.50 *dollars* clear of commission; D. W. Montgomery sold ½ sec. for me at $500 *d.*; the new firm has been tryin to sell the other ½ sec.; they wrote to me they can get $1.75 *do.* if I give them $50 *d.* of it. I answer that I would give them $25 of it; they sent on a deed stating they can only get $1.25 that by it of me. The S. E. ¼, sec. 31, town. 3, 8 R. is also for sale at the same price; the deed was recorded in Jefferson county, Neb., before your county-seat was established. See A. Follmers on this matter.

63

Yours, &c., GUTHRIE PROBYNE.

In accordance with the agreement set forth in the caption to this report made by and between the solicitors to the parties to beforenamed suit respectively, the complainant on his part introduced documentary evidence, the offer of the same and the objections thereto on the part of the respondent being as hereupon follows, and the said documents thus offered in evidence and marked respectively as Exhibits "A" to "G," inclusive, being filed by the examiner and attached to this report following the offers and objections as below set forth.

O. A. M., *Examiner.*

MONTGOMERY: On behalf of the complainant I offer in evidence deed from George L. Bittinger and wife to L. P. Dosh, dated August

22nd, '82, of the land in controversy, together with all the endorsements thereon.

Harwood objected as irrelevant, immaterial, and incompetent. The paper thus offered was marked "Exhibit A" and is hereto attached.

MONTGOMERY: I offer in evidence on behalf of the complainant warranty deed from L. P. Dosh and wife to J. R. Dosh, dated October 27th, 1882, of the land in controversy, together with all the endorsements on the deed.

Harwood objected as irrelevant, immaterial, and incompetent.

64 The paper this offered was marked "Exhibit B," and the same is hereto attached.

MONTGOMERY: I offer in evidence also treasurer's tax deed to Ferdinand Furst, dated November 21st, 1878, showing sale for the taxes of 1875 for the land in controversy, together with the indorsements thereon.

HARWOOD: This deed is objected to for the several reasons that it has no seal (treasurer's seal); it is not attested by the county seal nor by the county clerk; it does not appear that it was first offered for sale at public sale, but shows on its face that it was sold at private sale and not first offered at public sale, and it shows that the land was sold in bulk for the taxes set out and not sold in the smallest governmental subdivisions as required by law, and part of the taxes for which the deed shows the land was sold being illegal and invalid, viz., the land-road tax and the sinking-fund tax.

The paper was market Exhibit "C" and is hereto attached.

MONTGOMERY: I offer in evidence a warranty deed of the land in controversy from J. R. Dosh and wife to the complainant, J. K. O. Sherwood, dated January 13, 1883, together with the endorsements thereon.

Harwood objected as irrelevant and incompetent, and also that the deed was not filed for record until long after the respondent's deed was placed on record.

The paper was marked "D," and is hereto attached.

MONTGOMERY: I offer in evidence two tax receipts in favor of the complainant, Sherwood, showing payments by him of the taxes of 1884 and 1885 on the land in controversy, together with the draft thereto attached drawn by the treasurer of Nuckolls county upon the complainant, Mr. Sherwood.

Harwood objected as irrelevant and immaterial.

The paper was marked "E," and the same is hereto attached.

65 MONTGOMERY: I offer in evidence an abstract of title of the land in controversy, certified to by the county clerk of Nuckolls county and the treasurer of Nuckolls county, together with the certificate of the county clerk of Nuckolls county thereto attached.

No objection, and the paper was marked Exhibit "F," and the same is hereto attached.

MONTGOMERY: Now I offer in evidence copy of a record of deed from George L. Bittinger and wife to Guthrie Probyne, dated June 23rd, 1870, recorded in Jefferson county January 3rd, 1871, in

Book E of Deeds, at page 116, together with the certificate of the county clerk of Jefferson county that the copy is a true copy of said deed as this recorded.

Harwood objected as irrelevant, immaterial, and incompetent to affect this title.

The paper was marked Exhibit "G" and is hereto attached.

The above, as set forth, are all of the offers made on the part of the complainant at the time and place mentioned in the caption to this report and all of the documents offered in evidence as above and marked Exhibits "A" to "G," inclusive, and filed by the examiner are hereto attached and follow in their order.

O. A. M., *Examiner.*

COMPLAINANT'S EXHIBIT "A" x. O. A. M., Examiner.

SHERWOOD
vs.
MOELLE.

Know all men by these presents that we, George L. Bittinger and wife, of Allen county and State of Indiana, in consideration of the sum of one hundred dollars in hand paid by L. P. Dosh, of Scott county, State of Iowa, do hereby sell, convey, and quitclaim unto the said L. P. Dosh all our right, title, and interest in and to the following-described premises situated in the county of Nuckolls and State of Nebraska, to wit:

66 The west half and the southeast quarter of section thirty-one (31) township three (3) range eight (8) west of the 6th P. M.

And the said A. M. Bittinger wife of Geo. L. Bittinger hereby relinquishes her right of dower in and to the above-described premises.

Signed the 22n- day of August 1882.

GEORGE L. BITTINGER
A. M. BITTINGER

In presence of—
W. J. KERR.

STATE OF INDIANA, } ss:
Allen County, }

On this 22nd day of Aug., A. D. 1882, before me, a notary public within and for said county, personally came George L. Bittinger and A. M. Bittinger, his wife, personally to me known to be the identical persons whose name- are affixed to the above instrument as grantors, and severally acknowledged the execution of the same to be their voluntary act and deed for the purposes therein expressed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at Ft. Wayne, Indiana, on the date last above written.

[SEAL.]

W. J. KERR,
Notary Public.

Endorsed: Quitclaim deed. George L. Bittinger & W. to L. P. Dosh, Davenport, Iowa. State of Nebraska, Nuckolls county, *ss:* Entered on numerical index and filed for record 19th day of September, A. D. 1882. Filed for record this 19th day of September, A. D. 1882, at 11 o'clock a. m., and recorded in Book H 1 of Deeds, on page 21, of Nuckolls county record. J. P. Hammond, recorder. 75c. p'd.

67 COMPLAINANT'S EXHIBIT "B X." O. A. M., Examiner.

SHERWOOD
vs.
MOELLE.

Know all men by these presents, that we L. P. Dosh and M. V. Dosh husband and wife of Scott county, State of Iowa, in consideration of the sum of fifteen hundred and thirteen dollars, in hand paid by J. R. Dosh of Guthrie county, State of Iowa do hereby sell and convey unto the said J. R. Dosh and to his heirs and assigns, the following-described premises, situated in the county of Nuckolls and State of Nebraska, to wit The south half and the northwest quarter of section thirty-one (31) township three (3) range eight (8) west of the 6th P. M.

And we do hereby covenant with the said J. R. Dosh that we are lawfully seized of said premises; that they are free from incumbrance; that we have good right and lawful authority to sell and convey the same, and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever; and the grantors aforesaid hereby relinquish all contingent rights, including right of dower, which they have in and to the said described premises.

Signed the 27 day of October A. D. 1882.

L. P. DOSH
M. V. DOSH.

Attest: L. J. BROWN

STATE OF IOWA, }
Scott County, } *ss:*

On this 27th day of October, A. D. 1882, before me, L. P. Brown, a notary public in and for said county, personally came L. P. Dosh and M. V. Dosh, his wife, to me personally known to be the identical persons whose names are affixed to the above deed as grantors, and acknowledged the same to be their voluntary act and deed.

Witness my hand and notarial seal the date last above written.

[SEAL.] L. J. BROWN,
N. P. Scott Co., Iowa.

68 Endorsed: Warranty deed. L. P. Dosh & wife to L. R. Dosh. State of Nebraska, Nuckolls county, *ss:* Entered on numerical index and filed for record this 20th day of November, A.

D. 1882, at 11 o'clock a. m., and recorded in Book "H" of Deeds, on page 153. J. P. Hommond, recorder. Theo. J. Moelle, deputy. Fee, $1.00. P'd 75 cts.

COMPLAINANT'S EXHIBIT "C X." O. A. M., Examiner.

SHERWOOD
vs.
MOELLE.

Treasurer's Tax Deed.

Whereas, Ferdinand Furst did on the 21st day of November A. D. 1878, produce to the undersigned G. D. Follmer treasurer of the county of Nuckolls in the State of Nebraska, a certificate of purchase, in writing, bearing date the 20th day of September 1878 signed by G. D. Follmer, who at the last-mentioned date was treasurer of said county, from which it appears that James Grant did, on the 20th day of September 1876, purchase at the office of the county treasurers of said county, at private sale in said county, the tracts, parcels or lots of land lastly in this indenture described, which said real estate was sold to James Grant for the sum of one hundred thirty-one and .97 dollars, that being the amount due on the following tract or lot of land, situated in the county of Nuckolls and State of Nebraska, and returned delinquent for the non-payment of taxes costs, and charges for the year 1875, to wit:

Northeast quarter (¼) section No. twelve (12) township No. four (4) range No. six (6) the southeast quarter (¼) of southwest quarter (¼) and southwest quarter (¼) of southeast quarter (¼) and north half (½) of southeast quarter (¼) and southeast quarter (¼) of southeast quarter (¼) of section No. twenty (20), and the west half (½) and southeast quarter (¼) of section No. thirty-one (31) and the
69 southwest quarter (¼) of section No. thirty-two (32) township No. three (3) range No. eight (8) and all west of 6th principal meridian.

And it appearing that the said Ferdinand Furst is the legal owner of said certificate of purchase, and the time fixed by law for redeeming the land therein described having now expired, and the same not having been redeemed, as provided by law and the said Ferdinand Furst having demanded a deed for the tract of land mentioned in said certificate, and which was the least quantity of the tract above described, that would sell for the amount due thereon for taxes, costs and charges, as above specified; and it appearing that said lands were legally liable for taxation, and had been duly assessed and properly charged on the tax book or duplicate for the year 1875, and that said lands had been legally advertised for sale for taxes and were sold on the 20th day of September 1876.

Now therefore, this indenture, made this 21st day of November, 1878 between the State of Nebraska by G. D. Follmer, treasurer of said county of Nuckolls of the first part and Ferdinand Furst of the second part, witnesseth, that the said party of the first part, for and

in consideration of the premises and the sum of one dollar in hand paid, hath granted, bargained and sold and by these presents doth grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, the tracts or parcels of land mentioned in said certificate and described as follows, to wit: Northeast quarter section No. twelve, township No. four, range No. six—the southeast quarter of southwest quarter, and southeast quarter of section No. twenty, and west half and southeast quarter of section No. thirty-one, and the southwest quarter of section No. thirty-two, township No. three (3) range No. eight, and all west of 6th principal meridian situated in the county of Nuckolls and State of Nebraska.

70 To have and to hold said mentioned tracts or parcels of land, with the appurtenances thereunto belonging, to the said party of the second part, his heirs and assigns forever, in as full and ample a manner as the said treasurer of said county is empowered by law to sell the same.

In testimony whereof the said G. D. Follmer, treasurer of said county of Nuckolls, has hereunto set his hands and seal this 21st day of November, A. D. 1878.

G. D. FOLLMER,
Treasurer of Nuckolls County, State of Nebraska.

Attest: —— ——,
County Clerk.

In presence of—
O. A. FOLLMER.
D. W. BARKER.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

On this 23rd day of November, A. D. 1878, before me, the undersigned, a notary public duly commissioned and qualified for and residing in and for said county, personally appeared the abovenamed G. D. Follmer, treasurer of said county, and acknowledged the foregoing instrument and also the execution thereof to be his voluntary act a-d deed as such treasurer; and I further certify that I know the said G. D. Follmer, who executed the above deed as grantor, to be the identical person described therein and to be the treasurer of said county of Nuckolls, in the State of Nebraska.

In witness whereof I have hereunto set my hand and notarial seal the date aforesaid.

[SEAL.] D. W. BARKER,
Notary Public.

Endorsed: Tax deed. The State of Nebraska to Ferdinand Furst. The State of Nebraska, Nuckolls county, *ss:* Ficed for record in the clerk's office of said county the 3 day of Feb., 1879, at 12 o'clock m., and recorded & entered in numerical index, in Book D of
71 Deeds, on page- 422 & '3. J. Rittenbent, county clerk. Paid 1.50.

COMPLAINANT'S EXHIBIT "D x." O. A. M., Examiner.

SHERWOOD
vs.
NOELLE.

Warranty Deed.

Know all men by these presents: That we J. R. Dosh and A. M. Dosh his wife of the county of Guthrie and State of Iowa, in consideration of the sum of eighteen hundred dollars in hand paid by J. K. O. Sherwood of Kings county and State of New York, do hereby sell and convey unto the said J. K. O. Sherwood the following-described premises, situate in the county of Nuckolls and State of Nebraska to wit: The south half and the northwest quarter of sec. (31) thirty-one, t'p three (3), range eight (8) west of the 6th P. M.

And we hereby covenant with the said J. K. O. Sherwood that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrance- whatsoever. And we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

And the said Abba M. Dosh hereby relinquish- her right of dower in and to the above-described premises.

Signed this 13th day of Jan. A. D. 1883.

J. R. DOSH.
A. M. DOSH.

In presence of—
F. A. AGNEW.
C. G. THOMAS.

STATE OF IOWA, } *ss:*
Guthrie County, }

On this 13th day of January, 1883, before me, Frank A. Agnew, a notary public within and for said county, personally came J. R. Dosh and A. M. Dosh, personally to me known to be the identical persons whose names — affixed to the above instrument as
72 grantors, and acknowledged the execution of the same to be their voluntary act and deed for the purposes therein expressed.

In testimony whereof I have hereunto subscribed my name and affixed my seal, at Stuart, Iowa, on the date last above written.

[SEAL.] FRANK A. AGNEW,
Notary Public in and for Guthrie County, Iowa.

Endorsed: Warranty deed. J. R. Dosh, A. M. Dosh to J. K. O. Sherwood. Entered for taxation this 24 day of ——. Filed for record the 24 day of April, A. D. 1885, 12 o'clock m., and recorded in Book K, page 433, of Nuckolls county records. D. P. Britts, recorder.

$35.39. NELSON, NEB., *Sept. 17th*, 1885.

At sight pay to the order of Bank of Nelson thirty-five and $\frac{39}{100}$ dollars, value received, and charge the same, with exchange, to account of—

JOSEPH VAN VALIN.

To James K. O. Sherwood, No. 117 Broadway, N. Y. city.

Endorsed: Pay Wm. J. Quinlan, Jr., cashier, or order, for collection for account of Bank of Nelson. S. A. Lapp, cash. Received payment Sep. 22, 1885. Wm. J. Quinlan, Jr., cash'r.

73 1863. *Tax Receipt, Original.*

$——. Treasurer's office, Nuckolls Co., Neb.

SEPT. 17, 1885.

Received of James K. O. Sherwood thirty-five & $\frac{39}{100}$ dollars in full for the taxes and tax rec'pt for the year 1884 on the following-described property:

Part of section or name of town.	Sec. or lot.	Town or blk.	Rng.	Acres.	Valuation.	Sch'l tax.	Labor.	Dog.	Village.	Interest.	Am't of tax.	Total.
					$	$ Cts.	$	$	$	$ Cts.	$ Cts.	$ Cts.
W. ½	31	3	8	36	820	.....	.....	.....	.....	1 56	20 84	22 40
S. E. ¼	31	3	8	160	440	.....	.....	.....	.....	82	11 17	11 99
												34 39
									Tax receipt			1 00
Total	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	35 39

Duplicate. (S'g'd) JOSEPH VAN VALIN, *Treasurer.*
—— ——, *Deputy.*

Sherwood *vs.* Moelle. Two tax receipts & draft, being Complainant's Exhibit "E x," O. A. M., examiner.

74 752. *Tax Receipt, Original.*

$——. Treasurer's office, Nuckolls county, Neb.

MARCH 5, 1886.

Received of James K. O. Sherwood twelve & $\frac{98}{100}$ dollars in full for the taxes for the year 1885 on the following-described property:

Part of section or name of town.	Sec. or lot.	Town or blk.	Rng.	Acres.	Valuation.	Sch'l tax.	Labor.	Dog.	Village.	Interest.	Am't of tax.	Total.
					$	$ Cts.	$	$	$	$ Cts.	$ Cts.	$ Cts.
S. E. ¼	31	3	8	160	525	.....	.....	.....	.....	.....	.....	12 98
									Tax receipt			1 00
Total	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	13 98

Duplicate. $13 98. (S'g'd) JOSEPH VAN VALIN, *Treasurer.*
—— ——, *Deputy.*

(See table marked p. 75.)

76 STATE OF NEBRASKA, } ss:
Nuckolls County, }

I, V. P. Britts, county clerk and *ex officio* clerk of the district court within and for the said Nuckolls county, Nebraska, and having the custody of all real-estate records and records of the district court for said county, hereby certify that I have made diligent search for any instrument or instruments affecting the title to the following-described real estate, to wit, the southeast quarter of section thirty-one (31), township three (3) north, of range eight (8) west, of the 6th P. M., Nuckolls county, Nebraska, and that there are no deed or deeds or other instruments of record in the records of said Nuckolls county except as shown by an abstract of title made by me on this date and marked Exhibit "A" to above-described land.

In testimony whereof I have hereunto set my hand and affixed the seal of said county this 14th day of October, A. D. 1886.

[SEAL.] V. P. BRITTS,
County Clerk.

Endorsed: Abstract of title to S. E. ¼ 31, 3, 8.

COMPLAINANT'S EXHIBIT "G X." O. A. M., Examiner.

SHERWOOD }
vs.
MOELLE. }

Warranty Deed.

This indenture, made this 23rd day of June, in the year of our Lord one thousand eight hundred and seventy, between G. L. Bittinger & A. M. Bittinger his wife of the first part and Gutherie Probyne of the second part, witnesseth,

That the said parties of the first part for and in consideration of the sum of eighteen hundred ($1,800) dollars, to them in hand duly paid, the receipt whereof is hereby acknowledged, have sold
77 and by these presents do grant, convey and confirm unto the said party of the second part, his heirs and assigns, all the west half of section twenty-three (23) in township No. two (2) of range number eight (8) west containing three hundred and twenty (320) acres according to Government survey, also the southwest quarter of section thirty-two in township number three (3), of range number eight (8) west containing one hundred and sixty acres according to Government survey and the southwest quarter of section thirty-two in township number three (3) of range number eight (8) west containing one hundred and sixty acres according to Government survey in Nuckolls county and State of Nebraska.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest and claim whatsoever, as well in law as in equity of the said parties of the first part, of, in and to the same, with the appurtenances.

And the said G. L. Bittinger and A. M. Bittenger for their heirs, executors and administrators do hereby covenant and agree to and with the said party of the second part, his heirs and assigns that the said G. L. Bittinger and A. M. Bittinger at the time of the ensealing and delivery of these presents are lawfully seized in the said lands of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted premises, with the appurtenances and have good right and full power and lawful authority to grant and convey the same in the manner aforesaid. And the same are now free and clear of and from all former and other grants, charges, assessments, taxes and incumbrance, of whatsoever nature and the said G. L. Bittinger and A. M. Bittinger and their heirs the above-granted premises, with the appurte-
78 nances, against all persons whomsoever, lawfully claims or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

G. L. BITTINGER. [SEAL.]
A. M. BITTINGER. [SEAL.]

Signed, sealed, & delivered in presence of—
G. H. BUNGUT.
JAMES COLE.

[Stamps, $2.00.]

STATE OF NEBRASKA, } ss:
County of Otoe, }

On this 23rd day of June, A. D. 1870, before me, the subscriber, a notary public duly appointed, commissioned, and qualified for and residing in said county, personally appeared G. L. Bittinger and A. M. Bittinger, his wife, to me known to be the identical persons described in and whose names are affixed to the foregoing conveyance as grantors, and they acknowledged the same to be their voluntary act and deed.

In testimony whereof I have hereunto set my hand and notarial seal, at Nebraska City, in said county, the day and year last above written.

G. H. BUNGUT,
Notary Public.

[NOTARIAL SEAL.]

Recorded Jan'y 3rd, 1871.

J. Y. BYERS, *Recorder.*
B. L. PURDY, *Deputy.*

STATE OF NEBRASKA, } ss:
Jefferson County, }

I, J. T. Thompson, county clerk within and for said county, do hereby certify that the above and foregoing is a true and correct

copy of a certain instrument as the same appears of record
79 in my office in Book "E" of Deeds, page 116.

Witness my hand and official seal this 26th day of August, A. D. 1887.

[SEAL.] J. T. THOMPSON,
County Clerk.

Endorsed: Copy of Jefferson Co. record of deed from Bittinger to Probyne.

In the Circuit Court of the United States, District of Nebraska.

JAMES K. O. SHERWOOD
vs.
THEODORE J. MOELLE. } In Equity.

I, the undersigned, examiner in chancery in & for the circuit court of the United States, district of Nebraska, hereby certify that the deposition of Theodore J. Moelle, respondent in the above-named cause, was by me taken at the time and place mentioned in the caption to this report and in accordance with the agreement and stipulation set forth in said caption; that the said Theodore J. Moelle before testifying, as above set forth, was by me duly sworn to testify in the cause the truth, the whole truth, and nothing but the truth; that the deposition as above set forth is the whole of the deposition of the said Theodore J. Moelle, respondent; that the deposition of the said Moelle it was agreed by the solicitors representing the parties to the suit respectively (being taken down in short-hand by the examiner and afterwards reduced to this writing on the typewriter by the examiner) should not be signed by the deponent, the signature of the deponent being waived; that the exhibits (and the objections thereto) offered in evidence on the part of the respondent and also the exhibits (and objections thereto) offered in evidence on the part of the complainant in the cause are all
80 reported to the court in this report of the examiner, and that I am not attorney or relative of either of the parties to this cause nor in any way interested in the result of said cause.

OSCAR A. MULLON,
Examiner in Chancery.

Examiner's fees:

Complainant, Sherwood	$2 70
Respondent, Moelle	14 50
Rec'd of respondent's solicitor	14 50 as above.

OSCAR A. MULLON.

Upon the back of said proofs appear endorsements in words and figures following, to wit: No. 361, doc. I. Sherwood *vs.* Moelle. Proofs. Filed Nov. 18, 1887. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 18th day of November, 1887, replication was filed in said case; which said replication is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

JAMES K. O. SHERWOOD
vs.
THEO. J. MOELLE.

The replication of Theo. J. Moelle, plaintiff in cross-bill, to the answer of James K. Sherwood, defendant in cross-bill.

The repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say- that *they* will aver, maintain, and prove his said cross-bill of complaint to be true, certain, and sufficient in the law to be answered unto, and *that* the said answer of the said defendant to be uncertain, untrue, and insufficient to be replied unto by the repliant; without this, that any
81 other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things the repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray- as in and by his said cross-bill of complaint has already prayed.

HARWOOD, AMES AND KELLY,
Solicitors for Plaintiff in Cross-Bill.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 361, docket I. U. S. circuit court, district of Nebraska. In equity. James K. O. Sherwood *vs.* Theo. J. Moelle. Replication. Filed Nov. 18, 1887. Elmer D. Frank, clerk. Harwood, Ames & Kelly, solicitor- for plaintiff.

Thereupon, afterwards, at the January term of said court, on the 9th day of March, 1888, the following proceedings were had and done in said cause, as appears of record on folio 718, Journal "M" of said court, to wit:

JAMES K. O. SHERWOOD, Complainant in Original Bill,
vs.
THEODORE J. MOELLE, Defendant in Original Bill.
THEODORE J. MOELLE, Complainant in Cross-Bill,
vs.
JAMES K. O. SHERWOOD, Defendant in Cross-Bill.
} Decree. No. 361, "I."

This cause came on to be heard on the pleadings and testimony and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

That complainant's original bill of complaint be, and the
82 same is hereby, dismissed at his costs, taxed at $——.

And this cause coming on to be heard further on the

cross-bill of complaint — Theodore J. Moelle and the issues formed *the* thereon, it is ordered, adjudged, and decreed that the tax deed executed by G. D. Follmer, county treasurer of Nuckolls county, Nebraska, on the 21st day of November, 1878, purporting to convey the lands in controversy in this suit, together with other lands, to one Ferdinand Furst, be, and the same is hereby, adjudged as void and of no force or effect as a conveyance of the title of said premises, and that the said complainant, James K. O. Sherwood, have a lien upon the premises in controversy for the amount of taxes that he and his grantors, assignors, have paid under and by virtue of the tax deed and tax sales aforesaid, which is ascertained and found to be two hundred and twenty-five and thirty-five one-hundredths ($225.35) dollars, which sum shall bear interest at the rate of ten per cent. per annum until paid, which sum shall bear interest from the 9th day of January, 1888, until paid, and if not paid within ninety days from said 9th day of January, 1888, together with interest thereon as aforesaid, the said defend-nt in cross-bill, Jam-s K. O. Sherwood, may have an order of sale against the premises in controversy, as in mortgage foreclosure proceeding, and T. K. Sutton is hereby appointed special master to make said sale and to execute to the purchaser thereat a good and sufficient deed.

It is further ordered, adjudged, and decreed that the said several conveyances under which the said defendant in cross-bill, James K. O. Sherwood, claims to hold title to the premises in controversy be cancelled, set aside, and held for naught, and that
83 the said title of the said complainant, Theodore J. Moelle, be quieted in him, and that he be declared to be the legal owner of said premises, free and clear of all incumbrances, except the lien of the said James K. O. Sherwood for taxes as aforesaid, and that the said James K. O. Sherwood and his grantors and all persons claiming through his chain of title be forever enjoined from interfering in any way with the title of said Moelle to the said premises, to wit, the southeast quarter of section number thirty-one (31), in township number three (3) north, of range number eight (8) west, of the 6th principal meridian, situated in the county of Nuckolls, State of Nebraska; to which decree the said James K. O. Sherwood duly excepts, and prays an appeal to the Supreme Court of the United States; which appeal is hereby allowed and the cost bond on appeal is fixed at $250. Both parties are allowed to take *a* file evidence by affidavit or deposition as to the value of the property and the amount in controversy herein for the consideration of the Supreme Court as to its jurisdiction of this cause.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

Thereupon, afterwards, to wit, on the 18th day of May, 1888, motion was filed in said cause; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES K. O. SHERWOOD, Complainant,
vs.
THEODORE J. MOELLE, Defendant. } No. 361, Docket I.

Motion for Leave to File Petition for Rehearing.

Comes now the above-named complainant and represents to this honorable court that at the time of the hearing of the
84 above-entitled suit and when the decree was rendered therein it was believed by the complainant that the property in controversy was of sufficient value to give jurisdiction to the Supreme Court of the United States, and that an appeal in said suit would lie, but that since the said decree was rendered and since the expiration of the term when the decree was rendered the complainant has become assured that no appeal of the case will lie, by reason of the fact that the premises and matters in dispute *is* of a value less than $5,000.00.

The complainant, therefore, moves this honorable court that a petition in his behalf for a rehearing of the said cause may be admitted, and that a rehearing of the said cause may be granted at this present term of the court.

A copy of the petition for rehearing, which the complainant hereby prays leave to file, is hereto attached, marked "Exhibit A," and made a part hereof.

MONTGOMERY & JEFFREY,
Solicitors for Complainant.

C. S. MONTGOMERY, *Of Counsel.*

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

C. S. Montgomery, being first duly sworn according to law, makes oath and says that he is the solicitor and counsel for the complainant, who has had the exclusive control and charge of the above-entitled suit, and that the statements and allegations contained in the foregoing motion, after careful investigation, he verily believes to be true.

C. S. MONTGOMERY.

Signed in my presence and sworn to before me this 16th of May, A. D. 1888.

_____,
Notary Public.

85 EXHIBIT A.

In the Circuit Court of the United States for the District of Nebraska.

JAMES K. O. SHERWOOD, Complainant,
vs.
THEODORE J. MOELLE, Defendant. } No. 361, Docket I.

Petition for Rehearing.

Comes now the complainant, pursuant to leave of this honorable court duly given, and files this his petition for a rehearing of the above-entitled suit, and prays this honorable court to set aside and vacate the decree heretofore rendered in said suit and grant a rehearing upon the following questions raised by the pleadings and the evidence in the suit, namely:

First. Whether or not the complainant, who, as it appears from the undisputed evidence in the suit, when he purchased the land in controversy, found a complete chain of conveyances from the original grantee of the United States down to his grantor upon the proper records of Nuckolls county, Nebraska, had a right to rely thereon and obtained a perfect title to the land in controversy, it appearing further from the undisputed testimony that the complainant had no notice, either actual or constructive, of the equities effecting the title, to wit, the prior unrecorded warranty deed from Guthrie Probyne to George L. Bittinger, the defendant's grantor, which deed had been in existence and unrecorded for many years, the grantee therein never having taken possession of the said land or paid any taxes thereon, the said land being unoccupied and the said deed still unrecorded when the complainant purchased the land and received his deed therefor, and the complainant having paid, as it further appears from the undisputed evidence,
86 a full and sufficient consideration, and the defendant having purchased the land from Bittinger with full knowledge of the adverse claim of the complainant's grantor, who, as it also appears undisputed from the evidence, was a *bona fide* purchaser of the land for a sufficient consideration and without notice of any outstanding equities in favor of a third person.

Second. Whether or not a quitclaim deed alone is sufficient notice of outstanding equities as against a remote grantee who claims title by warranty deed, but through the grantee in the quitclaim deed, the said quitclaim deed having been of record for a number of years and these appearing no evidence of a claimant adverse thereto other than the fact of the quitclaim deed itself.

Third. Whether or not under the decisions of the supreme court of the State of Nebraska, in view of the particular facts of the case at bar, the decree should have been for the complainant instead of the defendant, such facts being in brief as follows: A quitclaim deed from the patentee of the land to L. P. Dosh; a warranty deed

for a sufficient consideration from L. P. Dosh to J. P. Dosh; a warranty deed for a sufficient consideration from J. P. Dosh to the complainant; good faith on the part of all the grantees in these deeds, expressly proven as to the complainant; no notice to the said grantees or any outstanding equities expressly proven as to the complainant; a complete chain of conveyances upon the proper records of the county at the time complainant purchased; an unrecorded warranty deed from Guthrie Probyne to one George L. Bittinger made prior to the quitclaim deed from Probyne to L. P. Dosh, this unrecorded deed placed upon the record after the complainant's
87 purchase; a deed from Bittinger to the defendant, made and delivered after complainant's purchase; the defendant's purchase made with full knowledge of the adverse claim of the complainant and his grantors; the land without occupancy and without evidence of ownership until after the complainant's purchases nothing done towards taking poseession of the land or to show any outstanding equity until after the defendant's purchase, when he took possession of the land.

Fourth. Whether or not the decision of the Supreme Court of the United States holding a grantee in a quitclaim deed is not a *bona fide* purchaser are applicable to the case at bar or should be given greater weight than the decisions of the supreme court of Nebraska, especially when it be considered that in all the cases decided by the Supreme Court of the United States the controversies were between the equitable owners of the property and either the immediate grantees themselves in the quitclaim deeds or such grantees' grantee, having actual notice of the outstanding equities of the third person, as will appear from an examination of the said decisions themselves.

Fifth. Whether a decree in said suit ought not to be rendered for the complainant instead of the defendant on the pleadings, the evidence, and the record in the suit.

MONTGOMERY & JEFFREY,
Solicitors for Complainant.

C. S. MONTGOMERY, *Of Counsel.*

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 361, docket I. In the circuit court of the United States for the district of Nebraska. James K. O. Sherwood, complainant, *vs.* Theodore J. Moelle, defendant.
88 Motion for leave to file petition for rehearing. Filed May 18. Elmer D. Frank, clerk. Montgomery & Jeffrey, solicitors for complainant.

Thereupon, afterwards, at the May term of said court, on the 29th day of October, 1888, the following proceedings were had and done in said cause as appears of record — Journal "N" of said court, to wit:

JAMES K. O. SHERWOOD
vs.
THEODORE J. MOELLE. } 361, I.

On motion of Montgomery and Jeffrey, solicitors for the complainant, it is ordered by the court that said complainant have leave to file petition for a rehearing.

Thereupon, afterwards, to wit, on the said 29th day of October, 1888, petition for rehearing was filed in said case; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES K. O. SHERWOOD, Complainant,
vs.
THEODORE J. MOELLE, Defendant. } No. 361, Docket I.

Petition for Rehearing.

Comes now the complainant, pursuant to leave of this honorable court duly given, and files this his petition for a rehearing of the above-entitled suit, and prays this honorable court to set aside and vacate the decree heretofore rendered in said suit and grant a rehearing upon the following questions raised by the pleadings and the evidence in the suit, namely:

First. Whether or not the complainant, who, as it appears
89 from the undisputed evidence in the suit, when he purchased the land in controversy, found a complete chain of conveyances from the original grantee of the United States down to his grantor upon the proper records of Nuckolls county, Nebraska, had a right to rely thereon and obtained a perfect title to the land in controversy, it appearing further from the undisputed testimony that the complainant had no notice, either actual or constructive, of the equities affecting the title, to wit, the prior unrecorded warranty deed from George L. Bittinger to Guthrie Probyne, the defendant's grantor, which deed had been in existence and unrecorded for many years, the grantee therein never having taken possession of the said land or paid any taxes thereon, the said land being unoccupied and the said deed still unrecorded when the complainant purchased the land and received his deed therefor, and the complainant having paid, as it further appears from the undisputed evidence, a full and sufficient consideration, and the defendant having purchased the land from Probyne with full knowledge of the adverse claim of the complainant's grantor, who, as it also appears undisputed from the evidence, was a *bona fide* purchaser of the land for a sufficient consideration and without notice of any outstanding equities in favor of a third person.

Second. Whether or not a quitclaim deed alone is sufficient notice of outstanding equities as against a remote grantee who claims title by warranty deed, but through the grantee in the quitclaim deed,

the said quitclaim deed having been of record for a number of years and there appearing no evidence of a claimant adverse thereto other than the fact of the quitclaim deed itself.

90 Third. Whether or not, under the decisions of the supreme court of the State of Nebraska, in view of the particular facts of the case at bar, the decree should have been for the complainant instead of the defendant, such facts being, in brief, as follows: A quitclaim deed from the patentee of the land to L. P. Dosh; a warranty deed for a sufficient consideration from L. P. Dosh to J. R. Dosh; a warranty deed for a sufficient consideration from J. R. Dosh to the complainant; good faith on the part of all the grantees in these deeds expressly proven as to the complainant; no notice to the said grantee of any outstanding equities expressly proven as to the complainant; a complete chain of conveyances upon the proper records of the county at the time complainant purchased; an unrecorded warranty deed from George L. Bittinger to one Guthrie Probyne, made prior to the quitclaim deed from Probyne to L. P. Dosh; this unrecorded deed placed upon record after the complainant's purchase; a deed from Probyne to the defendant, made and delivered after complainant's purchase; the defendant's purchase made with full knowledge of the adverse claim of the complainant and his grantors; the land without occupancy and without evidence of ownership until after the complainant's purchase; no taxes ever paid and nothing done towards taking possession of the land or to show any outstanding equity until after the defendant's purchase, when he took possession of the land.

Fourth. Whether or not the decisions of the Supreme Court of the United States holding a grantee in a quitclaim deed is not a *bona fide* purchaser are applicable to the case at bar or should be given greater weight than the decisions of the supreme court

91 of Nebraska, especially when it be considered that in all the cases decided by the Supreme Court of the United States the controversies were between the equitable owners of the property, either the immediate grantees themselves in the quitclaim deeds or such grantees' grantee having actual notice of the outstanding equities of the third person, as will appear from an examination of the said decisions themselves.

Fifth. Whether a decree in said suit ought not to be rendered for the complainant instead of the defendant on the pleadings, the evidence, and the record in the suit.

MONTGOMERY & JEFFREY,
Solicitors for Complainant.

C. S. MONTGOMERY, *Of Counsel.*

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 361, I. In the circuit court of the United States for the district of Nebraska. James K. O. Sherwood, complainant, *vs.* Theodore J. Moelle, defendant. Petition for rehearing. Filed Oct. 29, 1888. Elmer D. Frank, clerk. Montgomery & Jeffrey, solicitor- for complainant.

Thereupon, afterwards, to wit, on the said 29th day of October, 1888, opinion was filed in said case; which said opinion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES K. O. SHERWOOD
vs.
THEODORE J. MOELLE.

Opinion.

BREWER, *C. J.:*

This case is now submitted on petition for rehearing. When first submitted it was decided upon the proposition that
92 one who takes title by a mere quitclaim deed cannot be considered a *bona fide* purchaser, and a decree was ordered accordingly in favor of the defendant and cross-complainant. In this petition for rehearing that proposition is challenged, as well as its application to the fact in this case. Of the soundness of the proposition as a general one I have no doubt, although it may be possibly subject to some limitations. It has been recognized by many courts and frequently affirmed by the Supreme Court of the United States. In the recent case of Johnson *vs.* Williams, 37 Kansas, 179, Mr. Justice Valentine, who is one of the most painstaking and thoughtful judges I know, has collated the various authorities, and in the following guarded language states the conclusions of himself and the other members of that court as well as the principal reasons in support of the proposition.

We would think that in all cases, however, where a purchaser takes a quitclaim deed he must be presumed to take it with notice of all outstanding equities and interests of which he could, by the exercise of any reasonable diligence, obtain notice from an examination of all the records affecting the title to the property and from all inquiries which he might make of persons in the possession of the property or of persons paying taxes thereon or of any person who might, from any record or from any knowledge which the purchaser might have, seemingly have some interest in the property

In nearly all cases between individuals where land is sold or conveyed and where there is no doubt about the title a general warranty deed is given, and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received.

Hence when a party takes a quitclaim deed he knows he is
93 taking a doubtful title and is put upon inquiry as to the title.

The very form of the deed indicates to him that the grantor has doubts concerning the title, and the deed itself is notice to him that he is getting only a doubtful title; also, as a quitclaim deed can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly and by persons who have no real claim and scarcely a shadow of claim to the lands for which the deeds are given and the deeds be executed for a merely nominal

consideration and merely to enable speculators in doubtful titles to harass and annoy the real owners of the land, and speculators in doubtful titles are always ready to pay some trifling or nominal consideration to obtain a quitclaim deed.

I do not care, however, to enter into a discussion of that general proposition or consider what, if any, limitations thereof exist. That proposition is, I have stated, that no one who takes under a quitclaim deed can be considered a *bona fide* purchaser. The idea underlying the proposition is that when his grantor is willing to give him only a quitclaim deed he impliedly notifies him that there may be outstanding equities, and that he is willing to place him only in the same position which he himself holds. Now, in the case at bar the complainant took under a warranty deed; his immediate grantor also took under a warranty deed. It is true in the chain of title of record there appeared a quitclaim deed, but it was back of his immediate grantor's deed; and the question is whether if remotely in a chain of title there exists a quitclaim deed subsequent purchasers in good faith lose the protection of the apparent valid and clear deraignment of title from the Government by reason of the existence of such quitclaim deed.

94 In view of the fact that in the early history of titles in the West many conveyances were by quitclaim, this question becomes important. Fortunately for this case the question has been before the supreme court of this State and determined. Such determination is doubtless controlling in this court. Even if the question were — open one there are many substantial and weighty reasons for upholding the conclusions reached by the supreme court of the State. I merely content myself with quoting its language as found in the case of Snowden *vs.* ——, 31 N. W. Rep., Nebraska Report, as follows:

3. It is claimed that the quitclaim deed from Shirk to Poe conveyed no title, and that *bona fide* purchasers from Poe were not protected. The rule, no doubt, is that a person who procures of another real estate and receives a quitclaim deed only therefor is bound to inquire and ascertain at his peril what outstanding equities exist, if any, against the title.

The reason is his grantor will not warrant the title even as against himself; therefore it is a cause of suspicion.

We are not prepared to hold, however, that a quitclaim deed where the grantor has already conveyed will not in any case convey title. It is not unreasonable to suppose that a quitclaim deed occurs in many titles where there is no outstanding equity. In this case the quitclaim deed in question was made by Shirk to Poe to supply a deed which was supposed to have been lost. It was made to the grantee of such of the heirs of Snowden as were of lawful age. Shirk, upon the record of Otoe county, apparently possessed the legal title to the land in controversy, and a conveyance from him to Poe, although in the form of a quitclaim deed, in form, at least, transferred the legal title to Poe. No one

95 seems to have been in possession of the land nor had any charge of the same, and the fact that more than eight years

had elapsed from the time of the execution of the deed from Shirk to Snowden without the same having been recorded certainly was a strong circumstance tending to show that the title still remained in Shirk. It is the policy of the law that titles to real estate should become matters of certainty as far as possible, and that one who acts in good faith in purchasing and pays the value of the property shall be protected in his purchase; any other rule would operate to prevent settlement and improvements upon lands. A party, therefore, who finds a complete chain of conveyances from the original grantee to his grantor upon the proper records of the county may rely thereon, provided he has no notice, either actual or constructive, of the equities affecting the title and is a purchaser for a sufficient consideration. All those persons, therefore, who purchased from D'Gette and Warren, without notice, for valuable consideration and their grantees will be protected.

It may be added that the testimony clearly shows that the complainant acted in good faith—in ignorance of the outstanding title not apparent of record—and paid full value for the land, while, on the other hand, the defendant paid much less than the value and probably bought with notice of complainant's rights.

For these reasons the petition for rehearing is sustained and a decree entered in favor of the complainant quieting his title, as prayed.

I concur.

ELMER S. DUNDY, *Judge*.

Upon the back of said opinion appear endorsements in words and figures following, to wit: No. 361, I. U. S. circuit court, 96 district of Nebraska. James K. O. Sherwood *vs.* Theodore J. Moelle. Opinion. Filed Oct. 29, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 8th day of November, 1888, the following proceedings were had and done in said cause, as appears of record on folio 53, Journal "N" of said court, to wit:

JAMES K. O. SHERWOOD, Complainant,
vs.
THEODORE J. MOELLE, Defendant.
} Decree. No. 361, I.

This cause came on to be heard at this term upon the petition of the complainant for a rehearing; upon consideration whereof it was ordered, adjudged, and decreed that a rehearing be granted; and thereupon the cause came on to be further heard at this term upon the complainant's bill of complaint, the defendant's answer, the defendant's cross-bill of complaint, the complainant's answer thereto, and the replications of the respective parties to said answers and the evidence in the cause, and the same was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely:

That the decree heretofore herein signed, entered, and enrolled

be, and the same is hereby, vacated, cancelled, set aside, and declared null and void and of no effect.

That at the commencement of this action the complainant, James K. O. Sherwood, was and still is the owner and entitled to the possession of the premises in dispute, namely, the southeast quarter of section thirty-one (31), in township three (3) north, of range eight (8) west, situated in the county of Nuckolls and State of Nebraska, as against the said defendant, Theodore J. Moelle, and all persons claiming by, through, or under him since the commencement
97 of this suit, and that the said defendant, Theodore J. Moelle, did not have at the commencement of this action and has not now any title to the said premises or right of possession thereto.

That the said defendant, Theodore J. Moelle, wrongfully withholds the possession of said premises from the complainant, who is entitled to receive the possession thereof from the said defendant, Theodore J. Moelle, who is hereby decreed to deliver up to the said complainant the possession of said premises upon demand and presentation of certified copy of this decree to him by the complainant.

That the said complainant's title to said premises be, and the same is hereby, quieted and declared perfect, legal, and valid as against the said defendant and all persons claiming by, through, or under him, and the said defendant and all persons claiming by, through, or under him are hereby perpetually enjoined from setting up or claiming any title to said premises as against said complainant, James K. O. Sherwood, and his grantees.

That the said complainant do have and recover from the said defendant the costs of this action, to be taxed by the clerk, and that the said complainant have execution therefor.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, at the November term of said court, on the 16th day of November, 1888, the following proceedings were had and done in said cause, as appears of record on folio 106, Journal "N" of said court, to wit:

JAMES K. O. SHERWOOD
vs. } 361, 1.
THEODORE J. MOELLE.

Now comes the defendant, by Harwood Ames & Kelly, his
98 solicitors, and in open court prays an appeal to the Supreme Court of the United States from the decree herein; which said appeal is hereby granted by the court and bond fixed at the sum of two thousand dollars.

Thereupon, afterwards, to wit, on the 3rd day of January, 1889, bond was filed in said case; which said bond is in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant,

and

THEODORE J. MOELLE, Plaintiff in Cross-Bill,
vs.
JAMES K. O. SHERWOOD, Defendant in Cross-Bill.

Supersedeas Bond.

Know all men by these presents that we, Theodore J. Moelle, as principal, and Peter Yunker and Louis Schumun, as sureties, are held and firmly bound under James K. O. Sherwood in the penal sum of two thousand ($2,000) dollars.

The condition of the above obligation is such that whereas the above-bounden Theodore J. Moelle has prayed an appeal in the above-entitled cause to the Supreme Court of the United States, and the circuit court has fixed his said bond in the sum of two thousand dollars aforesaid:

Now, then, if the above-bounden — shall duly perfect his said appeal and prosecute the same to a final determination and pay all costs of suit and just damages for delay and costs and interest on the appeal in case judgment should finally be determined against
99 him, then this bond shall be void; otherwise to remain in full force and effect.

Signed this 21st day of December, A. D. 1888.

THEO. J. MOELLE, *Principal.*
PETER YUNKER,
LOUIS SCHUMUN, *Sureties.*

STATE OF NEBRASKA, } *ss:*
Nuckolls County, }

Peter Yunker and Louis Schumun, who subscribed the foregoing instrument as sureties, being first duly sworn, deposes and says that they and each of them are worth two thousand — ($2,000) over and above all legal exemptions subject to execution.

Subscribed in my presence and sworn to before me this 21st day of December, 1888.

A. H. BOWMAN;
[SEAL.] *Notary Public.*

Approved 3 Jan., 1889.
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 361, I. James K. O. Sherwood, plain-

tiff, *vs.* Theodore J. Moelle, defendant, and Theodore J. Moelle, plaintiff in cross-bill, *vs.* James K. O. Sherwood, defendant in cross-bill. Supersedeas bond. Filed Jan. 3, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 9th day of January, 1889, the following proceedings were had and done in said cause, as appears of record on folio 230, Journal "N" of said court, to wit:

JAMES K. O. SHERWOOD
vs.
THEODORE J. MOELLE. } 361, I.

Now come the parties hereto, by their solicitors, and on
100 motion leave is granted defendant by the court to file affidavits as to value of property in dispute herein in thirty days and complainant counter-affidavits in sixty days from this date.

Thereupon, afterwards, to wit, on the 9th day of February, 1889, affidavits were filed in said case; which said affidavits are in words and figures following, to wit:

Affidavits by Defendant.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

James M. Campbell, dealer in real estate; D. W. Barker, att'y & dealer in real estate; H. W. Short, att'y & dealer in real estate for 10 y'rs, being first duly sworn, say that they are engaged in the business of buying and selling real estate in said county of Nuckolls and are well acquainted with the values of real estate in said county; that they personally know the land in controversy, to wit, the southeast quarter of section 31, township 3 north, of range 8 west; that said land is well improved, has a valuable orchard growing thereon, also a large amount of valuable trees and shrubbery; that it is located a mile and a half from Mt. Clare station, a station on a branch of the Missouri Pacific railroad; that said premises are reasonably worth the sum of thirty-five — ($35) per acre, or $5,600.

J. M. CAMPBELL,
Dealer of 2 *Y'rs.*
D. W. BARKER,
Att'y-at-Law and Dealer in Real Estate for 7 *Y'rs.*
101 H. W. SHORT,
Dealer in Real Estate for 10 *Y'rs.*

Subscribed in my presence and sworn to before me this 30th day of Jan'y, A. D. 1889.

[SEAL.] S. A. LAPP,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, doc. I. James K. O. Sherwood, plaintiff, *vs.* Theodore J. Moelle, defendant. Affidavit of James M. Campbell, D. W. Barker, and H. W. Short, dealers in real estate. Filed Feb. 9th, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

A. W. McReynolds, J. P. Hammond, J. H. Pritts, & E. S. Kennedy & A. H. Bowman, being first duly sworn, each for himself alone on oath says that he is respectively county judge, ex-county surveyor, sheriff, and ex-county clerk of the county of Nuckolls, in said State of Nebraska; that they are well acquainted with the real-estate values in the county of Nuckolls, and they have *had* dealt more or less in real estate in said county; that they are well acquainted with the southeast quarter of section 31, in township 3 north, of range 8 west, in said county; that said land is situated one and a half miles from Mt. Clare station, a station on a branch of the Missouri Pacific railroad; that said premises are highly improved with fair buildings and have a large amount of trees
102 and shrub-ery and an orchard growing thereon; that said premises are reasonably worth thirty-five dollars per acre, or $5,600; and further these affiants saith not.

A. W. McREYNOLDS,
Ex-Co. Sur.
J. P. HAMMOND,
Ex & Co. Clerk.
J. H. PRITTS,
County Judge.
E. S. KENNEDY,
Justice Nelson Precinct.
A. H. BOWMAN, *Sheriff.*

Subscribed in my presence and sworn to before me this 20th day of Jan'y, A. D. 1889.

[SEAL.] S. A. LAPP,
Notary Public.

Upon the back of said affidavit- appear endorsements in words and figures following, to wit: No. 361, doc. I. James K. O. Sherwood, plaintiff, *vs.* Theodore J. Moelle, defendant. Affidavits of A. W. McReynolds, J. P. Hammond, J. H. Pritts, E. S. Kennedy, & A. H. Bowman. Filed Feb. 9, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

Theodore J. Moelle, being first duly sworn, on oath says that since the giving of his testimony in this case the land in controversy in this suit has been enhanced in value considerably by reason of the building of a branch of the Missouri Pacific railroad through that section of the country and the location of a station and depot within one mile and a half of said land, to wit, the southeast quarter
103 of section 31, in township 3 north, of range 8 west, and that said premises are and were reasonably worth on the date of the judgment in this case at least thirty-five ($35) dollars per acre, or $5,600.

Affiant further says that he has lived many years in this section of the country, and is well acquainted with the real-estate values; and further saith not.

THEO. J. MOELLE.

Subscribed in my presence and sworn to before me this 30th day of January, A. D. 1889.

[SEAL.]

S. A. LAPP,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, doc. I. James K. O. Sherwood, plaintiff, *vs.* Theodore J. Moelle, defendant. Affidavit of Theodore J. Moelle. Filed Feb. 9, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

Charles E. Reid, dealer in nursery stock of over 6 years; William Spurck, real-estate owner & farmer; N. H. Stoner, farmer; Henry

Limke, farmer; Louis Schumon, farmer; P. Kippenbender, farmer, resident freeholder, being first duly sworn, say that they reside in the vicinity of the premises in controversy; that they are engaged in the business of dealing in fruit and forest trees and in the business of farming and are well acquainted with the value of real estate and of the improvements thereon, and are capable
104 and believe themselves capable of judging the value of the southeast quarter of section 31, town. 3, range 8; that said premises are well improved with good frame houses, stables, cribs, growing orchard, large amount of trees and shrub-ery, and that the same are worth according to our best judgment as follows:

160 acres of land, at $10.00 per acre	$1,600 00
110 acres of breaking & plowing, at $3.00	330 00
Frame house	1,200 00
Pasture	100 00
Out-buildings	500 00
2 wells & windmills	200 00
140 apple trees, at $6.00, five years' standing	840 00
90 apple trees, at $3.00, four years' standing	270 00
36 pear trees, at $8.00, five " "	288 00
20 plum trees, at $2.00, five " "	40 00
10 cherry trees, at $2.00, five " "	20 00
All kind of shrubbery and small fruit	100 00
300 grapevines, at 50 cts.	150 00
1,000 Russ. mulberries, bearing, at 20 cts.	200 00
2,000 ash, at 5 cts.	100 00
1,500 catalpa speciosa, at 10 cts.	150 00
500 black walnut, at 10 cts.	50 00
1,000 poplar, at 5 cts.	50 00
5,000 eastern yellow cotton, at 5 cts.	250 00
1,500 box elder, soft maple, h-ckberry, evergreens, etc.	150 00
	$6,588 00

and that said premises by reason of the high state of cultivation and improvements are worth over $35.00 per acre in affiants' judgment.

C. E. REID.
WM. SPURCK.
N. H. STONER.
HENRY LIMKE.
LOUIS SCHUMON.
PETER KIPPENBENDER.

Subscribed in my presence and sworn to before me this 30th day of Jan'y, A. D. 1889.

[SEAL.]

S. A. LAPP,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, doc. I. James K. O. Sher-

wood, plaintiff, *vs.* Theodore J. Moelle, defendant. Affidavits of C. E. Reid, dealer in nursery stock; William Spurck, W. N. Stoner. Filed Feb. 9, 1889. Elmer D. Frank, clerk.

105 Thereupon, afterwards, to wit, on the 9th day of March, 1889, affidavits of plaintiff's were filed in said case; which said affidavits are in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss*:

I, L. P. Dosh, being duly sworn, say I am acquainted with D. W. Barker, one of the persons whose affidavits are on file in this case; that said D. W. Barker owns S. E. ¼ of sec. 32, twp. 3, R. 8, and I was informed that he has offered for sale within the last year at $17 an acre; that said land is as good as the S. E. ¼ of sec. 31, 3, 8; that said D. W. Barker- estimate in his affidavit aforesaid is erroneous, as appears by a letter of his hereto attached as an exhibit, in which he places the value of S. E. 31, 3, 8 at $2,500.

L. P. DOSH.

Subscribed in my presence and sworn to before me this 2nd day of March, 1889.

[SEAL.] S. A. SEARLE,
Notary Public.

D. W. Barker, attorney-at-law & notary public.

NELSON, NEB., *April* 25, 1888.

L. P. Dosh, Davenport, Iowa.

DEAR SIR: In answer to your inquiry concerning W. ½ 31, 3, 8, say, if unimproved, it is worth about eleven — ($11.00) per acre, and if improved the above amount plus value of improvements.

106 In regard to the S. E. ¼ 30, 3, 8, the land is perhaps worth $12.50 per acre, plus improvements.

The quarter if fairly improved is worth $2,500.00.

Trusting that the above is the information desired, we are—

Yours truly, BARKER & COSIN.

P. S.—The reason for delay is D. W. Barker has been away.

B. & C.

W. ½ of 31, 3, 8 has only 274.36 acres in it.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

I, L. P. Dosh, being duly sworn, say that on March 2d, 1889, at Nelson, in said county, I had a conversation with E. S. Kennedy, one of the affiants in affidavit filed in this case Feb. 9, 1889, in which I asked if he had been out to see the Moelle farm before he made oath that it was worth $35 an acre; he said he had made no such affidavit at all, but that some one came into his office saying an appraisement he had at one time made had been lost and this was a duplicate; that he did not read the paper, but, seeing 3 or 4 well-known names preceeding his and supposing it was a mere personal matter, he signed it, but that he was not sworn thereto.

On the same day I had a conversation with A. W. McReynolds, another affiant in same affidavit, and asked him if he had ever been on the Moelle farm; he said he had, but not recently. I
107 asked how he came to place the valuation of $35 an acre on that farm when other good improved farms could be had at from $15 to $18 an acre; he said he had heard that Moelle had some imported trees on the place which were very valuable; that he had taken his idea of the values from a list of things which Moelle had furnished him and took it for granted that the things were worth what Moelle told him they were.

L. P. DOSH.

Subscribed in my presence and sworn to before me this 2nd day of March, 1889.

[SEAL.] S. A. SEARLE,
Notary Public.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

We, S. A. Searle and L. P. Dosh, being duly sworn, depose and say that on the 2nd day of March, 1889, we met N. H. Stoner in the road near his home; that S. A. Searle asked him as to the values of land in the neighborhood. He said improved farms could be had for from $15 to $18 per acre. He, Searle, then asked how he came

to place a valuation of $6,500 on S. E. ¼ sec. 31, t'w'p 3, R. 8, occupied by Theodore J. Moelle. He said he had not done so. He was then shown a copy of what purported to be his affidavit, duly certified as such copy by Elmer D. Frank, clerk of this court. He was greatly surprised and said he had never signed or sworn to any paper; that he and some others were asked if they were willing to say that the Moelle land was worth $10 an acre, when he
108 said he was, and that he then signed a paper; that nothing was said to him about trees on the place, and if his name appears on any such paper it was procured there by handing him for signature a different paper from that which was read to him, and that he was not sworn to any paper at all; that, in his opinion, the land was not worth over from $2,500.00 to $3,000, but, as they claimed to have his name on one paper, he did not care to also put it on another. During this conversation he sat in one buggy and we in another.

S. A. SEARLE.
L. P. DOSH.

Sworn to before me by the said S. A. Searle and L. P. Dosh separately and severally and by them subscribed in my presence this 2nd day of March, A. D. 1889.

[SEAL.] R. HOLLINGSWORTH,
Clerk District Court.

Endorsed: No. 361, doc. I. James K. O. Sherwood, pl'ff, *vs.* Theodore J. Moelle, def't. Affidavits of S. A. Searle and L. P. Dosh. Filed March 9, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

We, S. A. Searle and L. P. Dosh, being each duly sworn, deposes and say- each for himself that on the morning of this 2nd day of March, 1889, we drove out to see the land in controversy in this suit, to wit, S. E. ¼ of sec. 31, t'w'p 3, R. 8, occupied by Theodore
109 J. Moelle, with a view of ascertaining its quality and value; that said land is entirely surrounded by wild prairie and his nearest neighbor resides a mile away; that we sat together in a buggy, and while Mr. Moelle stood in the edge of the field Mr. Searle asked Mr. Moelle if he knew any land about there for sale and whether there was much land being *being* sold. He replied there was not; that it was a dull time and not much demand for land. He said he was authorized to sell the northwest quarter of sec. 5, t'w'p 3, R. 8, which cornered with said S. E. ¼ sec. 31, 3, 8, at

$1,000, being $6¼ an acre, it being land of the same general quality, but perhaps a little more broken than the S. E. ¼ of 31; that wild land generally was not worth more than 6¼ to $10 an acre. We drove clear around the place and interviewed all the neighbors whom we could find and obtained their views as to values of other farms, some of as good character and as good improvements and some of better, and in no instance was a higher value placed than $20 in any improved farm within a radius of 5 miles of the said Moelle farm. Three or four of the persons whom we interviewed expressed a desire to sell. We were credibly informed that wild land immediately adjoining the land in controversy on the west could be bought for $8 or $9 an acre, nearly as good land as the said S. E. ¼ of sec. 31, 3, 8.

From the facts above stated and from having been informed of prices at which improved farms have been sold in other parts of the county we believe we are able to say we know the value of the said S. E. ¼ of sec. 31, 3, 8, and that it would not be worth at the present time to exceed the sum of $3,000. We visited the station of Mt. Claire and found it as described in the affidavit of Grant Geyer and others, and do not think such a station so located would have much influence upon the value of the land. Said station of Mt.
110 Clare is located on E. ½ of S. E. ¼ of sec. 33, t'w'p 5, R. 8, and is 1½ miles from the nearest point of said land in controversy.

S. A. SEARLE.
L. P. DOSH.

Sworn to before me by the said S. A. Searle and L. P. Dosh separately and severally and by them subscribed in my presence this 2nd day of March, A. D. 1889.

[SEAL.] R. HOLLINGWORTH,
Clerk Dist. Court.

Endorsed: No. 361, doc. I. James K. O. Sherwood, pl'ff, *vs.* Theodore J. Moelle. Affidavit- of S. A. Searle, L. P. Dosh. Filed Mar. 9, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

We, Grant Greger, John Matzener, Luke Dawson, Fred. Obenrider, S. S. Woodward, C. Newmann, Wm. Shaw, James Martin, and W. H. H. Miller, being duly sworn, deposes and say, each for himself and not for the other, *say* we are engaged in the business of farming and reside within five miles of the southeast quarter of section 31, t'w'p 3, R. 8, which is now occupied by Theodore J. Moelle and

which is in controversy in this suit; that we are acquainted with the said land and know its value and know the value of land in this vicinity, and affiants say that said land is not worth to exceed the sum of twenty dollars an acre, including all the improvements, in all $3,200, and that wild
111 land of the same quality and same location is not worth to exceed $8 to $10 an acre; and affiants further say that owing to the partial failure of crops for the past three successive years in this locality on account of drought the marked value of lands generally has been decreasing during that period, and the said S. E. ¼ of sec. 31, t'w'p 3, R. 8, is not worth as much in the market to-day as it was three years ago; that the so-called station of Mount Clare, on the Missouri Pacific R'y, was established about one year and a half ago, and the railway station-house was built at that time, but the R'y Co. has never put an agent or telegraph operator in charge of said station or side track, and that the only so-called business building in the town consist of one building about 14 x 18 ft., one story high, and another building 18 x 20 ft., one story high, and a blacksmith shop, and that there is but one so-called residence in the town, and that the value of said land has not been materially enhanced by the building of said railway as affiant verily believes.

S. S. WOODWARD.
C. NEWMANN.
WM. SHAW.
JAMES MARTIN.
GRANT GREGER.
JOHN MATZENER.
LUKE DAWSON.
FRED. OBENRIDER.
W. H. H. MILLER.

Sworn to before me by the said S. S. Woodward, C. Newmann, Wm. Shaw, James Martin, W. H. H. Miller, Grant Greger, John Matzener, Luke Dawson, and Fred. Obenrider, individually, severally, and separately, and by them subscribed in my presence, this 2nd day of March, A. D. 1889.

[SEAL.] S. A. SEARLE,
Notary Public.

Endorsed: No. 361, doc. I. James K. O. Sherwood, pl'ff, *vs.* Theodore J. Moelle, def't. Affidavits of Grant Geyer, John Matzener, Luke Obenrider, S. S. Woodward, C. Newmann, Wm. Shaw, James Martin, W. H. Miller.

112 In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, *Nuckolls County,* } *ss:*

We, whose names are hereunto subscribed, to wit, Joseph E. Haught, Rudolf Frey, Samuel Hunzicker, and J. W. Honeycutt, being each duly sworn, depose and say, each for himself and not for the others, that we are engaged in the business of farming and reside within five miles of the S. E. ¼ of sec. 31, t'p 3, R. 8, which is in controversy in the above entitled suit, and are familiar with the values of land in this vicinity, and are acquainted with and know the value of said S. E. ¼ of sec. 31, t'p 3, R. 8, now occupied by Theodore J. Moelle, and affiants say that said land is not worth to exceed the sum of twenty dollars per acre, including all improvements, making a total value of $3,200.00, and that wild land of the same quality and location is not worth to exceed $8 or $10 per acre.

JOSEPH E. HAUGHT.
SAMUEL HUNZICKER.
RUDOLF FREY.
J. W. HONEYCUTT.

Sworn to before me by the said Joseph E. Haught, Rudolf Frey, Samuel Hunzicker, and J. W. Honeycutt, severally and individually, and by them subscribed in my presence, this 2nd day of March, A. D. 1889.

[SEAL.] S. A. SEARLE,
Notary Public.

Endorsed: No. 361, doc. I. James K. O. Sherwood, pl'ff, *vs.* Theodore J. Moelle, def't. Affidavits of Joseph E. Haught, Rudolf Frey, Samuel Hunzicker, J. W. Honeycutt. Filed Mar. 9, 1889. Elmer D. Frank, clerk.

113 In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, *Nuckolls County,* } *ss:*

I, F. S. Shaw, being duly sworn, deposes and say I am county clerk of Nuckolls county, Nebraska, and *ex officio* clerk of the board of supervisors; that as such clerk I have the custody of the assessment-rolls, which are returned by the assessors of the various

precincts; that it is one of my duties to enter the assessments and prepare the tax-lists to be placed in the hands of the treasurer for collection; that the assessed value of the southeast quarter of section thirty-one (31), township three (3), range eight (8), for the year 1888 is $480.00; that said amount is assessed on the above as eighty acres improved and eighty acres unimproved land, is not less than the assessed value of other improved land in the same precinct and in the county generally, and that it is the custom in this county to assess land, with all improvements, at about one-third of its actual value.

F. S. SHAW,
County Clerk.

Subscribed & sworn to by F. S. Shaw, Co. clerk, before me this 6th day of March, 1889.

[SEAL.] HENRY FOX, JR.,
Notary Public.

Endorsed: No. 361, docket I. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavit of F. S. Shaw, county clerk. Filed Mar. 9, 1889. Elmer D. Frank, clerk.

114 In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

I, R. M. Gourley, being duly sworn, depose and say I am treasurer of Nuckolls Co., Neb., and as such treasurer have charge of the collection of the taxes; that for the year 1888 the assessed value of the S. E. ¼ of sec. 31, t'w'p. 3, R. 8, as appears from the tax-list, is $480.00; that it is assessed as 80 acres improved and 80 acres unimproved, and is not assessed at a lower rate than other similarly improved farms in the same precinct; that it is the rule in this county to assess land at about one-third or less of its actual value, including all improvements.

R. M. GOURLEY, *Co. Treas.*

Subscribed & sworn to by R. M. Gourlay, Co. treasurer, before me this 6th day of March, 1889.

[SEAL.] HENRY FOX, JR.,
Notary Public.

Upon the back of said affidavits appear endorsements in words and figures following, to wit: No. 361, I. U. S. circuit court, district of Nebraska. Sherwood *vs.* Moelle. Eight affidavits filed by plaintiff as to value of property in dispute. Filed Mar. 9, 1889. Elmer D. Frank, clerk. Montgomery & Jeffrey, pl'ff's solicitors.

Thereupon, afterwards, to wit, on the 11th day of March, 1889, affidavit- of J. H. Todd and others were filed in said case; which said affidavits are in words and figures following, to wit:

115 In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, *Pl'ff.* } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss*:

We, J. H. Todd, F. P. Bonnell, A. C. Corkle, and J. M. McElhinney, being each duly sworn, each deposes and says he is engaged in the business of buying and selling real estate in said Nuckolls Co., Nebraska; that he knows the value of lands generally in said county; that he is acquainted with the land in controversy in the above-entitled action, being the S. E. ¼ of sec. 31, t'w'p. 3, R. 8, occupied by Theodore J. Moelle, and that said land, including all improvements, is not worth to exceed the sum of $20 per acre or $3,200.00; that wild land in the same locality is not worth more than from $7 to $11 an acre.

J. H. TODD.
F. P. BONNELL.
A. C. McCORKLE.
J. M. McELHINNEY.

Subscribed and sworn to before me this 7th day of March, A. D. 1889, at Superior, Nuckolls county, Nebraska.

[SEAL.] I. E. VALE,
Notary Public in and for Nuckolls County, Nebraska.

Fee, $3.00, paid by pl'ff.

E. Upon the back of said affidavits appear endorsements in words and figures following, to wit: No. 361, docket I. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavits of J. H. Todd, F. P. Bonnell, A. C. McCorkle, J. W. McElhinney, filed by plaintiff on question of value of property in controversy. Filed Mar. 11, 1889. Elmer D. Frank, clerk.

116 Thereupon, afterwards, at the January term of said court, on the 11th day of March, 1889, the following proceedings were had and done in said case, as appears of record on Journal "N" of said court, to wit:

JAMES K. O. SHERWOOD
vs. } 361, I.
THEODORE J. MOELLE.

Now come the parties hereto, by their respective solicitors, and

on motion leave is granted by the court to file additional affidavits herein in ten days from this date.

Thereupon, afterwards, to wit, on the 16th of March, 1889, affidavits were filed in said case; which said affidavits are in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
York County, } *ss*:

I, J. W. Small, being duly sworn, say that in the year 1884 I owned the west half of section 31, t'w'p 3, range 8, in Nuckolls Co., Nebr.; that said land adjoined the southeast quarter of said sec. 31, t'w'p. 3, R. 8; that I am dealing in real estate and know the value of land in that neighborhood, and said S. E. ¼ of sec. 31, t'w'p. 3, R. 8, is not worth to exceed $10 an acre; that I am not sufficiently acquainted with any improvements on said land to express an opinion as to their value.

J. W. SMALL.

Subscribed in my presence and sworn to before me this 12th day of March, 1889.

D. T. MOORE, [SEAL.]
Notary Public.

117 Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 261, docket I. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavit of J. W. Small, real-estate dealer, filed by plaintiff on question of value of property in dispute. Filed Mar. 16, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 21st day of March, 1889, affidavits were filed in said case; which said affidavits are in words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss*:

I, the undersigned, Neri Conner, being first duly sworn, depose and say that I have been engaged in the business of agriculture for

the last 30 years past until within about 6 months last past; that I have resided within five miles of the southeast ¼ of section 31, in township 3 north, of range 8 west, of the 6th P. M., in Nuckolls county, Nebraska, which is in controversy in the above-entitled suit, and that I am familiar with the values of land in this vicinity and am acquainted with and know the value of said southeast ¼ of sec. 31, t'w'p 3, R. 8, now occupied by Theodore J. Moelle; and affiant says that said land is not worth to exceed the sum of twenty dollars per acre, including all improvements, making a total value of $3,200, and that wild land of the same quality and location is not worth to exceed $8.00 to $10.00 per acre.

NERI CONNER.

Subscribed in my presence and sworn to before me this
118 18th day of March, A. D. 1889.
[SEAL.] J. A. MILLER,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavit of Neri Conner, farmer, filed by plaintiff on question of value of property in controversy. Filed Mar. 21, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

I. H. N. Banks, being first duly sworn, depose- and say- that he is a resident of Nelson, Nuckolls county, Nebraska; that he is a carpenter and joiner by occupation; that he has been engaged in that occupation for more than 20 years last past; that he is well acquainted with the value of buildings; that he has examined the buildings on the southeast quarter of section thirty-one (31), in township three (3) north, of range eight (8), in Nuckolls county, Nebraska, and which is now occupied by Theodore J. Moelle and which is in controversy in the above-entitled cause; that he has made a careful estimate of said buildings on said premises, and that they are not worth to exceed the following sums:

Foundation under house	90
House	525
All other buildings	150
1 wind-mill & tower	65

Affiant further states that he is well acquainted with the value of real estate in the vicinity of said land, and that he is well
119 acquainted with the above-described land, and that said land, together with all the improvements thereon, is not of the value to exceed the sum of $4,000, placed at high figures.

Affiant further states that on the 18th day of March, A. D. 1889, he assisted the county surveyor of Nuckolls county, Nebraska, to survey the cultivated land on said described premises, and that the exact amount of land under cultivation is just 72 and $\frac{59}{100}$ acres.

H. N. BANKS.

Subscribed in my presence and sworn to before me this 19th day of March, A. D. 1889.

[SEAL.] J. A. MILLER,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavit of N. H. Banks, carpenter, filed by complainant on question of value of property in controversy. Filed Mar. 21, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

THE STATE OF NEBRASKA,
Nuckolls County, } *ss:*

J. A. Miller, being first duly sworn according to law, depose- and says that he is a resident of Nelson, Nuckolls county, Nebraska; that he now is and has been for the last 3 years past engaged in the practice of law; that prior to that time he was engaged in the business of selling and dealing in nursery stock, and is well acquainted with the value of fruit and other trees growing on real estate;
120 that he is well acquainted with the southeast quarter of section 31, township 3 north, of range 8 west, of the 6th P. M., in Nuckolls county, Nebraska, which is now occupied by Theodore J. Moelle and which is in controversy in the above-entitled action; that he, on the 18th day of March, 1889, made an examination of the trees and shrub-ery growing on said premises and they are not of a value to exceed the following sums:

33 pear trees, 5 yrs. old, at $3.00	99
20 plums trees, 5 yrs. old, at $2	40
10 cherry trees, 5 yrs. old, at $3	30
112 apple trees, 5 yrs. old, at $3	336
80 apple trees, said to be 4 yrs. old, at 1.50	120
300 grapevines, at .50	150

About 3,000 forest trees	300
Small fruit & shrub-ery	30
	1,096

and of a total value of $1,096; that there is also about 2½ acres of ground which has been planted in ash, box elder, walnut, hickory, and cotton-wood seedlings, but they are in so poor a condition and so many are dead that it is hard to place a value on them; that many of the fruit trees have made a poor growth for the time they have been planted and are not in first-class condition, and that, as affiant is informed by Theodore J. Moelle, none of said trees or vines, excepting a few grapevines, have ever grown any fruit. Affiant further states the other improvements on said premises are very common and inexpensive; that all out-buildings are of very little consequence; that there is an ordinary frame house 1½ story with a 1-story wing on said premises, one well and 1 wind-mill, about 26 acres pasture enclosed with a 2-wire fence, and not more than 73 acres under cultivation, and affiant verily believes that $25 per acre for said land, including all improvements, would be a good value.

121 And further deponent saith not.

J. A. MILLER.

Subscribed in my presence and sworn to before me this 19th day of March, 1889.

[SEAL.] C. A. JOHNSON,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. U. S. circuit court, district of Nebraska. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavit of J. A. Miller, filed by complainant on question of value of property in dispute. Filed Mar. 21, 1889. Elmer D. Frank, clerk.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

THE STATE OF NEBRASKA, *Nuckolls County,* } *ss:*

I, E. D. Hobbs, being first duly sworn according to law, deposes and says that he is a resident of Nelson, Nuckolls county, Nebraska; that he is a dealer in real estate, and has been so engaged in Nelson, Nebraska, for the last seven years; that he is familiar with the value of real estate in said county of Nuckolls, and especially with the southeast ¼ of section 31, in township three (3) north, of range

eight (8), which is now occupied by Theodore J. Moelle and which is in controversy in the above-entitled action; that he has made a careful estimate of the value of said land and the improvement thereon and the value of the same would not exceed the sums as itemized below:

122	160 acres of land at $10	1,600	
	Dwelling-house, 16 x 24, 1½ story; wing, 12 x 16, 1 story	600	
	Cribs, barns, & out-buildings	250	
	1 wind-mill and pump	75	
	2 wells, $40 each	80	
	33 pear trees at $3	99	
	20 plum trees at $1	20	
	10 cherry trees at $2.50	25	
	112 apple trees, 5 yrs. old, at $3	336	
	80 apple trees, 3 yrs. old, at $1.50	120	
	300 grapes at 30 cts.	90	
	3,000 catalpa, ash, R. mulberry, Lombardy poplar, etc.	300	
	26 acres pasture fence	75	
	Gooseberries, blackberries, currants, etc.	50	
	72½ acres cultivated land (cultivated)	217	50
		3,937	50

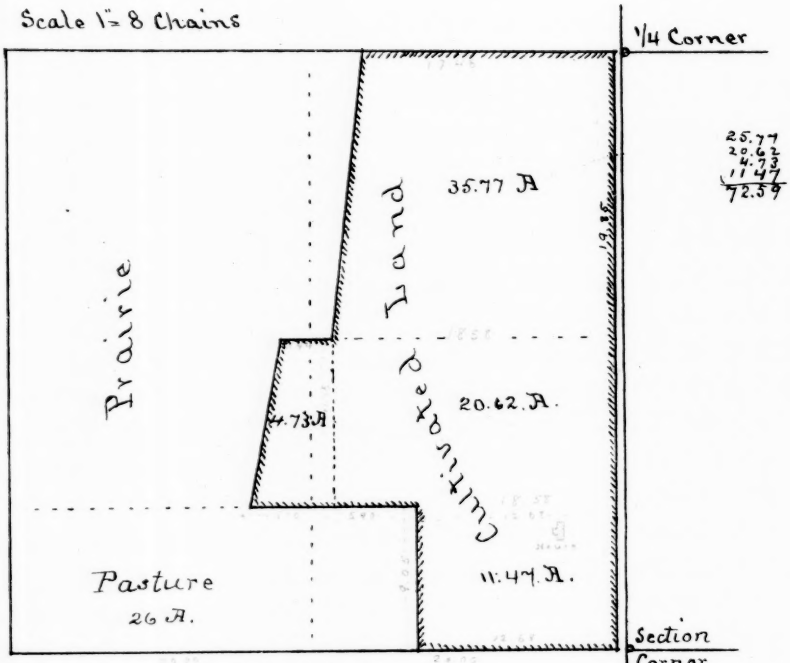
And affiant further says that said above-described land is not worth at high figures to exceed the sum of $25 per acre on the following terms of payment: ¼ cash, the balance in 4 annual payments, with 8 per cent. interest on deferred payments; that wild lands in the same vicinity as the above-described land is worth from $8 to $12 per acre.

E. D. HOBBS.

Subscribed in my presence and sworn to before me this 18th day of March, A. D. 1889.

[SEAL.] J. A. MILLER,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, doc. I. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavit of E. D. Hobbs, real-estate dealer, filed by pl'ff on question of value of property in controversy. Filed Mar. 21, 1889. Elmer D. Frank, clerk.


Scale 1"= 8 Chains
1/4 Corner
25.77
20.62
4.73
11.47
72.59
35.77 A
Land
Cultivated
20.62 A.
4.73 A
Prairie
Pasture
26 A.
11.47 A.
Section
Corner
No. 103.
Morelle
v.
Sherwood.
p. 124.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Plaintiff,
vs.
THEODORE J. MOELLE, Defendant. } Affidavit.

THE STATE OF NEBRASKA, *Nuckolls County,* } *ss:*

123 E. A. D. Parker, being first duly sworn according to law, deposes and says that he is a resident of Nelson, Nuckolls county, Nebraska, and a surveyor and civil engineer by occupation and the county surveyor of said Nuckolls county; that on the 18 day of March, 1889, he made a survey and plat of the cultivated portion of the southeast quarter, ¼, of section thirty-one (31), in township three (3) north, of range eight (8) west, of the 6th P. M. in Nuckolls county, Nebraska, which said land is now occupied by Theodore J. Moelle and which is in controversy in the above-entitled cause; that said plat is hereto attached, marked Exhibit "A," and made a part hereof, and that the same is true and correct; that there is 72 and $\frac{59}{100}$ acres under cultivation on said quarter section by actual survey and measurement, and no more. Affiant further states that he is by reason of his occupation well acquainted with the value of real estate in the vicinity of said land, and that he is well acquainted with the above-described land, and that the same is not worth to exceed the sum of $4,000 at high figures, including all improvements of any and all kinds on said land; that said land is within 1¾ miles of the village of Mr. Clare, which was located on the Missouri Pacific railway about 18 months ago, and consists of one temporary dwelling, 2 storerooms 18 x 24 feet and 1 story high, one depot building, one windmill and tank on railway, one blacksmith shop, and one section-house; that said railway company has never permanently placed either a ticket, freight, or other agent on telegraph operator at said station, and that the value of land has not been increased in the vicinity by reason of the building of said railway or town; that wild land in the same vicinity and
124 locality of said land is of the value of from $8.00 to $10.00 per acre.

E. A. D. PARKER.

Subscribed in my presence and sworn to before me this 19th day of March, A. D. 1889.

[SEAL.]

J. A. MILLER,
Notary Public.

EXHIBIT "A."

Sketch Showing Location of and Acreage of Cultivated Land on the S. E. ¼ of Section 31, *Town.* 3 *North, of Range* 8 *West.*

(Here follows diagram marked p. 124.)

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. James K. O. Sherwood *vs.* Theodore J. Moelle. Affidavit of E. A. S. Parker, surveyor. Filed by comp't on question of value of property in controversy. Filed Mar. 21, 1889. Elmer D. Frank, clerk.

125 Thereupon, afterwards, to wit, on the 5th day of April, 1889, fourteen affidavits of defendant were filed in said case; which said affidavits are in words and figures following, to wit:

Affidavit of Frank S. Shaw.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

Frank S. Shaw, being first duly sworn, upon his oath deposes and says that he is the county clerk of Nuckolls county, Nebraska; that I have made a diligent search of the records of this county and find that S. S. Woodward, Fred. Odenreider, Luke Dawson, Grant Gregger, John Matzener, Rudolph Frey, Jos. Haught, Sam. Hunziker, Charles Newman, H. N. Banks, J. A. Miller, of Nelson, and E. A. D. Parker are not resident freeholders of this county, and that J. W. Small was formerly a resident of Clay county, went into bankruptcy, and is now a resident of York county, Nebraska.

F. S. SHAW,
County Clerk.

Subscribed and sworn to before me this 21 day of March, 1889.
[SEAL.] H. W. SHORT,
Notary Public in and for Nuckolls Co., Neb.

Upon the back of said affidavits appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of Frank S. Shaw. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

126 *Affidavit of Neri Conner.*

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def'ts. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

Neri Conner, being first duly sworn, deposes and says that I admit

that I signed an affidavit before J. A. Miller, notary public, in the above cause on the 18th day of March, 1889.

That I did not understand that the S. E. ¼ of 31, 3, 8, was specially named in said affidavit. In fixing the value of lands I meant to state general value of farms with ordinary improvements thereon. I have never been in the orchard of Theodore J. Moelle to examine his fruits and trees, and I am not familiar with the value of fruit trees—orchards—and did not intend to fix a value on the trees.

NERI CONNER.

Subscribed in my presence and sworn to before me this 28th day of March, 1889.

[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of said affidavit appears endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of Neri Conner. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

127 *Affidavit of Frank S. Shaw.*

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. NOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss.*:

Frank S. Shaw, being first duly sworn, upon oath deposes and says that he is the county clerk of Nuckolls county, Nebraska, and *ex officio* clerk of the board of supervisors of said county; that I have made a former affidavit in this case as to the assessed valuation of the southeast quarter of section thirty-one, township three north, range eight west, for the year A. D. 1888, and that a wrong idea or value may be inferred from my said affidavit. I wish to add that *under* chapter 77, section two, of the Revenue Laws of Nebraska for 1887 exempts from taxation certain improvements and reads as follows (after exempting certain property): "Provided further that the increased value of lands by reason of live f*i*nces, fruit and forest trees grown and cultivated thereon, shall not be taken into account in the assessment thereof" for the reason — the special or valuable improvements on said land would not affect the value for assessment or revenue purposes.

F. S. SHAW,
County Clerk.

Subscribed and sworn to before me this 21 day of M'ch, 1889.

[SEAL.] H. W. SHORT,
Notary Public in and for Nuckolls Co., Neb.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of Frank S. Shaw. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

128 *Affidavit of Theo. J. Moelle.*

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

Theodore J. Moelle, being first duly sworn, says that he is acquainted with one S. A. Searle, the notary public before whom the affidavits of S. S. Woodward, Grant Greger, Luke Dawson, John Metzener, Fred. Odenrider, Joseph E. Haught, Samuel Hunzicker, Rudolf Frey, and J. W. Honeycutt purports to have been taken; that said S. A. Searle is a notary public, commissioned, qualified for, and residing in Nuckolls county, Nebraska, at Nelson, Nebraska; that this affiant has been informed by the said witnesses hereinbefore named that said Searle, as notary public aforesaid, administered the oath to said witnesses at their several places of residence, and that the sworn witnesses do not live in the county of Nuckolls; that their place of residence and the place where said affidavits were made and subscribed was in the county of Webster, in the State of Nebraska, and *that* in the county in which said notary public resides and in and for which he was appointed and commissioned as a notary public.

Affiant further says that the said John Schenrer and J. W. Carnes, who testify in the affidavits filed by this affiant, were the carpenters who erected the dwelling on the land in controversy, and they fix the value of said residence at $1,200.00 from an actual knowledge of its cost.

That Neri Conner, whose affidavit was filed by the plaintiff March 21st, 1889, to the best of my knowledge has never been upon
129 the land in controversy and does not know the value of improvements thereon, and that said Conner is not a freeholder.

THEODORE J. MOELLE.

Subscribed in my presence and sworn to before me this 27th day of March, 1889.

[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of Theo. J. Moelle. Filed April 5, 1889. Elmer D. Frank, clerk.

Affidavit of Theo. J. Moelle.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

Theodore J. Moelle, first being duly sworn, upon his oath deposes and says that J. H. Todd, F. P. Bonnell, A. C. McCorkle, and J. M. McElhinney, affiants in a certain affidavit filed in this case March 19, 1889, lives 20 miles from the land in controversy; that to my personal knowledge they never was or have seen any of the improvements upon the S. E. ¼ of sec. 31, town. 3, range 8; also that one S. S. Woodward, being an old, feeble lady of over 70 years; Luke Dawson, and Grant Gregger, being under age, and *that* Fred. Odenrider, other affiants in a certain affidavit filed in this case March 9, 1889, have never been or entered upon the land in controversy, and that the same parties, also John Metzener, Rud. Frey, Jos. Haught, Samuel Hunzicker, Charles Newman, affiants in the same affidavit filed March 9, 1889, and Geo. N. Banks, J. A.
130 Miller, and O. A. D. Parker, affiants in a certain affidavits filed in this case March —, 1889, are non-residents freeholders of Nuckolls county, State of Nebraska.

THEODORE J. MOELLE.

Subscribed and sworn to before me this 21 day of March, 1889.

H. W. SHORT,
Notary Public in and for Nuckolls County, Neb.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of Theo. J. Moelle. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

Affidavit of N. H. Stoner.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

N. H. Stoner, being first duly sworn, upon his oath deposes and says that he is the person named and referred to in the affidavit of S. A. Searle and L. P. Dosh, filed March 9th, 1889.

That affiant admits that he had a conversation with said Searle and Dosh on the 2nd day of March at the time and place named in said affidavit.

But affiant says and alleges the facts to be as follows:

That I did decline to sign an affidavit for said parties; admits that I said said land was worth from $8.00 to $15.00 per acre. In answer to their inquiry as to the value — improved lands, I said farms were worth from $15.00, $18.00 to $20.00 per acre. I
131 had no special reference to the S. E. ¼ 31, 3, 8, of Theodore J. Moelle at that time, and in stating that said land was worth $10.00 I had reference to the land without the improvements thereon. I have been on the place at least fifty times in the last two and -- half years, and know the improvements thereon. The land and improvements is reasonably worth five thousand six hundred dollars.

I do not know of another farm in this vicinity that is improved with fruits and shrubbery like this place.

N. H. STONER.

Subscribed in my presence and sworn to before me this 28th day of March, 1889.

[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of N. H. Stoner. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

Affidavit of D. W. Barker.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

D. W. Barker, being first duly sworn, says that he has no recollection of writing the letter referred to in the affidavit of L. P. Dosh filed March 9th, 1889, and verily believe that he did not write said letter.

132 Further, affiant says that he has not offered his land referred to in said letter or affidavit within the last five years for less than twenty-five dollars per acre; that the S. E. ¼ 31, 3, 8, is improved far superior to my land, in this, that my said land contains a small house and one hundred and twenty acres of breaking, or about that amount, without fruits, groves, shrubbery, or any other kind of trees or improvements which my renter has on said land, amounting to $100.00, that add to its value, as is the case with the property of Theodore J. Moelle, which is reasonably worth $35.00 per acre.

D. W. BARKER.

Subscribed in my presence and sworn to before me this 26th day of March, A. D. 1889.

[SEAL.] H. W. SHORT,
Notary Public.

I certify that the interlineation were made by D. W. Barker before signing and executing.

[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of *asid* affidavit appears endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of D. W. Barker. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

Affidavit of John C. Schenrer.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

John C. Schenrer, being first duly solemnly sworn, upon
133 his oath deposes and says that I *an* a contractor and builder, residing at Nelson, in Nuckolls county, Nebraska. I know the general values of lands in this county.

I also know the southeast quarter of section thirty-one, occupied by Theodore J. Moelle, in township three north, range eight west, of the 6th P. M., in said Nuckolls county. As a carpenter, contractor, and builder I erected the dwelling-house now on said land; that said house is worth at a fair, reasonable, and just valuation the sum of $1,200.00; that the said land is well improved, much more than ordinary farms in this county, with *with* evergreens, shrubbery, fruit & forest trees, grapes, currant-, raspberries, and small fruits; that the improvements thereon are very valuable, to wit, of the actual value of at least $4,000.00; that the value of the land without improvements is at least $1,600.00.

That the total value of said land and improvements is at least $5,600.00.

That I have no interest in this suit or action and am not related to either party or concerned in its prosecution or defense.

JOHN C. SCHENRER.

Subscribed in my presence and sworn to before me this 21st day of March, A. D. 1889.

[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of John C. Shenrer. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

134 *Affidavit of Henry A. Rice, T. C. Mongar, & Geo. B. McClellan.*

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

We, Henry A. Rice, T. C. Mongar, and George B. McClellan, being first duly sworn, each for himself deposes and says—

That we have resided in the county of Nuckolls, State of Nebraska, for more than three years past; that we are acquainted with the values of farms & lands in this county and have a personal knowledge of the southeast quarter of section thirty-one, township three north, range eight west, occupied by Theodore J. Moelle; that we have been upon said premises and have made a careful and personal inspection of the lands and improvements thereon, consisting of buildings, breaking, wells, wind-mill, orchards, groves, evergreens, shrubbery, and small fruits; that said farm is one of the best improved in this county; its value consists largely of the extra fine improvements; that this land, to wit, S. E. ¼ 31, 3, 8, is reasonably worth at least six thousand dollars.

We have no interest in the result of the foregoing suit and are not related to plaintiff or defendant and are not concerned in its prosecution or defense.

HENRY A. RICE.
T. C. MONGAR.
GEORGE B. McCLELLAN.

Subscribed in my presence and sworn to before me this 26th day of March, 1889.

[SEAL.] H. W. SHORT,
Notary Public.

135 Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, 1. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of Henry A. Rice, T. C. Mongar, and Geo. B. McClellan. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

Affidavit of E. S. Kennedy.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss*:

E. S. Kennedy, being first duly sworn, deposes and says that he admits that he had a conversation with L. P. Dosh, as stated in his affidavit filed March 9th, 1889; that he thought he signed a duplicate affidavit; that he was informed that the original appraisement was lost; that when he made that statement it was true that this affiant had not been upon the land recently, but from his knowledge thought the paper as signed by the other witnesses *were* correct.

That to fully satisfy himself fully as to the value and the improvements on said land he has visited said land and finds it better and improved even better than he thought.

That in his joint affidavit with A. W. McReynolds of this date the true facts and values are set forth as they now exist at this date.

E. S. KENNEDY.

136 Subscribed and sworn to before me this 26th day of March, 1889.

[SEAL.] H. W. SHORT,
No-ary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of E. S. Kennedy. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

Affidavit of E. S. Kennedy & A. W. McReynolds.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

STATE OF NEBRASKA, }
Nuckolls County, } *ss*:

E. S. Kennedy and A. W. McReynolds, being first duly sworn, deposes and says that we are resident freeholders of Nuckolls county, Nebraska; that they have resided in said county for more than ten years last past; that they are acquainted with the value

of land in said county and have a special knowledge of the south-east quarter of section thirty-one, township three north, range eight west, occupied by Theodore J. Moelle; that I have recently made a close and careful examination of said land and find the same improved as follows and the several items of improvements worth the sum set opposite thereto, to wit:

Land, 160 acres		1,600
House & cellar		1,000
Breaking		250
Pasture		100
Out-buildings		200
Wells & wind-mills		200
Apple trees, 3 to 9 years old		840
Apple trees, 3 to 6 yrs. old		270
	Pear trees	288
137	Plum trees	40
	Cherry trees	25
Raspberry & gooseberries & small fruit		125
Grapevines		150
Mulberry		110
Ash		100
Catalpa		100
Bl'k walnut, poplar, box alder, maple, & evergreen trees		400
And of the total value		$5,798 00

This affidavit I make in conformation of our former affidavits. After a more close and personal inspection we find the property had been improved since our last visit to the place and is now improved and of the value above set forth; that we are not related to plaintiff or defendant and have no interest in this suit.

E. S. KENNEDY.
A. W. McREYNOLDS.

Subscribed and sworn to before me this 26th day of March, 1889.
[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of E. S. Kennedy and A. W. McReynolds. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

Affidavit of T. P. Landon.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

T. P. Landon, being first duly sworn, deposeth and saith
138 that I am a resident and freeholder of Nuckolls county, having lived in said county for seven years; that my occupation during that time has been that of a farmer, and I have been extensively engaged in the sale, as also the planting and cultivation, of fruit and forest trees. I have done a business of about $3,000.00 to $4,000.00 in this county annually. I know the values of all kinds of fruit and forest trees, both from the nursery and when grown. I further say that apple trees 7 to 9 yrs. old are worth $6.00 each.

Apple, 7 to 8	years,	worth,	each		$3 00
Pears, 9	"	"	"		10 00
Plums, 9	"	"	"		2 50
Cherry, 7 to 9	"	"	"		3 00
Grapes, 5	"	"	"		50
Russian mulberry		"	"		20
Ash, 6	"	"	"		07
Catalpa, 5	yrs.	old	each		10
Black W, 5	"	"	"		10
Poplar, 5	"	"	"		05
Yellow cotton, —	"	"	"		05
Soft maple, 10	"	"	"		10
Box elder, 10	"	"	"		10

I further say I do not know the number of trees on the southeast quarter of section thirty-one, township three north, range eight west, occupied by Theodore J. Moelle, but testify only to actual values of such trees and shrubbery. These trees are beginning to bear and are of the finest and best varieties. I am not interested in the prosecution or defense of this case and am not related to the parties, but testify to the facts without fear, favor, or hope of reward.

THOS. P. LANDON.

Subscribed in my presence and sworn to before me this 27th day of March, A. D. 1889.

[SEAL.]

H. W. SHORT,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of T. P. Landon. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

139 *Affidavit of O. V. Ingersoll, W. R. Knapp, & Springer Galley.*

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE, Def't. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

O. V. Ingersoll, W. R. Knapp, ex-county judge, and Springer Galbey, being first duly sworn, deposes and says that they are well acquainted with the values of farms and lands in Nuckolls county, Nebraska, and with the southeast quarter of section thirty-one, in township three north, range eight west.

That we have recently made a close and careful inspection of said premises and of the improvements thereon; that we value the same at the following sums, to wit:

Land	1,600
Breaking	270
House & cellar	1,200
Wells & windmills	150
Stables & out-buildings	300
Pasture fence	120
Fruit trees, orchard	850
Pear trees in garden	24
28 pear trees	160
Mulberry	100
Cherry trees	50
Garden apple trees	44
Gooseberries	10
300 grapevines	150
Berries (in garden)	10
Prun-s " "	15
Hedge, rods of	
Mulberry, ash, poplar, & cotton-wood	350
Three and a half acres of grove	85

We know the value of the above improvements, and the above is a just, fair, and reasonable value for the same.

That the estimate thereof is based upon an actual view of the property as it is at this present time; that we nor either or any one of us have any interest in the result of the foregoing suit or
140 action; that we are not related to the plaintiff or defendant in any manner, neither are we counsel or attorney for the

plaintiff or defendant. We have made the foregoing affidavits of the facts as we find them and know them to be without fear, favor, or hope of reward, and we say that the total value of said land, with the improvements thereon, is in the aggregate worth the sum of five thousand four hundred and eighty-eight dollars.

O. V. INGERSOLL.
SPRINGER GALBEY.
W. P. KNAPP.

Subscribed in my presence and sworn to before me this 26th day of March, 1889.

[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavit of O. V. Ingersoll, W. R. Knapp, and Springer Galley. Filed Apr. 5, 1889. Elmer D. Frank, clerk.

Affidavit of Thomas, Crawford, Kemmerer, Worden, Carnes, & Wilkins.

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES K. O. SHERWOOD, Pl'ff,
vs.
THEODORE J. MOELLE. } Affidavit.

THE STATE OF NEBRASKA, }
Nuckolls County, } *ss:*

We, the undersigned, V. A. Thomas (teacher), W. B. Crawford (dealer agr. imp.), Ira D. Kemmerer (ex Co. com.), E. T. Worden (deputy sheriff), J. W. Carnes (carpenter), G. A. Wilkins (Co. commissioner), being first duly severally sworn, *and* each for himself deposes and says that we are resident freeholders of Nuckolls county, in the State of Nebraska, over the age of twenty-one years; that we have lived in said county from four to fifteen years; that we are acquainted with the general value of lands in said county; that we have a personal knowledge of the southeast quarter of section thirty-one, township three north, range eight west, of the sixth P. M., and we have recently made a careful, personal, and close examination of said land and of the improvements thereon; that said land is now improved as follows, and the several items of improvements are of the several values set opposite to the list as herein numbered and set forth:

141

1. Land, 160 acres	1,600 00
2. Value of breaking 90 acres	210
3. Dwelling-house & cellar	1,200
4. Two wells & windmills	150
5. Pasture, 26 acres	100
6. Out-buildings	300

7. 140 apple trees 8 to 9 y'rs old	840
8. 72 apple trees 7 to 8 " "	210
9. 36 pear trees 7 to 9 " "	288
10. 20 plum trees 7 to 9 " "	40
11. 10 cherry trees 7 to 9 " "	20
12. 300 grapevines	150
13. 1,000 Russian mulberry	100
14. 2,000 ash	100
15. 1,500 catalpa	150
16. 500 black walnut	50
17. 1,000 poplar	50
18. 5,000 yellow cotton-wood	250
19. 1,500 box elder & soft maple	150
20. Shrubbery and small fruit	75
	$6,033 00

And the total value of said land with the improvements thereon are at a fair and reasonable valuation worth the sum of six thousand and thirty-three dollars.

That we have no interest in the foregoing suit or cause of action and have no interest in its prosecution or its defense, and we are not related to the plaintiff or defendants or in any manner concerned therein except to swear to the true state of facts as they exhist
142 without fear, favor, or hope of reward.

V. A. THOMAS.
W. B. CRAWFORD.
IRA D. KEMMERER.
E. T. WORDEN.
J. W. CARNES.
G. A. WILKINS.

Subscribed in my presence and sworn to before me by V. A. Thomas, W. B. Crawford, Ira D. Kemmerer, E. T. Worden, J. W. Carnes, and G. A. Wilkins this 27th day of March, 1889.

[SEAL.] H. W. SHORT,
Notary Public.

Upon the back of said affidavit appear endorsements in words and figures following, to wit: No. 361, I. Jas. K. O. Sherwood *vs.* Theo. J. Moelle. Affidavits of V. A. Thomas, W. B. Crawford, Ira D. Kemmerer, E. T. Worden, J. W. Carnes, G. A. Wilkins. Filed A-r. 5, 1889. Elmer D. Frank, clerk.

143 DISTRICT OF NEBRASKA, *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth circuit and district of Nebraska, do hereby certify that the foregoing folios from one to 143 contain true and faithful transcripts of all pleadings, proofs, and proceedings of record and on file in my office as said clerk and the whole thereof and the

endorsements thereon in the case of James K. O. Sherwood *vs.* Theodore J. Moelle.

Witness my hand and the seal of said circuit court, at Omaha, this 13th day of May, A. D. 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Case No. 13,656. Nebraska C. C. U. S. No. 103. Theodore J. Moelle, appellant, *vs.* James K. O. Sherwood. Filed September 25, 1889.

148 U.S. 21

Office Supreme Ct.
FILED.
NOV 16 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 103.

THEODORE J. MOELLE,
APPELLANT,

vs.

JAMES K. O. SHERWOOD,
APPELLEE.

BRIEF OF COUNSEL FOR APPELLEE ON MOTION TO DISMISS.

RABER, PRINTER, ROOM B, NEW YORK LIFE BUILDING.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 103.

THEODORE J. MOELLE, *Appellant*,
vs.
JAMES K. O. SHERWOOD, *Appellee*.

Brief of Counsel for Appellee on Motion to Dismiss.

The property in controversy in this suit consists of 160 acres of land in Nebraska. Final decree was enrolled in favor of the appellee November 8th, 1888. The order allowing the appeal was granted November 16th, 1888. On January 9th, 1889, leave was granted to the parties to file affidavits on the subject of value. Affidavits were filed by both parties, and the same are copied in the printed record in this Court on pages 64 to 95, both inclusive.

This order to file affidavits was granted upon the theory that the case came within the rule of *Wilson vs. Blair*, 119 U. S., 387.

I urge the following considerations in support of the motion:

FIRST.

THE APPELLANT IS ESTOPPED BY THE PROCEEDINGS IN THE COURT BELOW, IN WHICH HE ACQUIESCED, FROM ASSERTING THAT THE VALUE OF THE PROPERTY IN CONTROVERSY AT THE TIME THE APPEAL WAS GRANTED WAS OVER $5,000.00.

Upon the first hearing of the suit in the Circuit Court a decree was rendered March 9th, 1888, in favor of the appellant (record, pp. 52 and 53). By the terms of said decree, at its conclusion, an appeal to this Court was allowed, both parties being granted leave to "file evidence by affidavit or deposition as to the value of the property and the amount in controversy herein for the consideration of the Supreme Court as to its jurisdiction of this cause." At the term of court during which the said decree was granted nothing

further was done, but immediately after the commencement of the following term, and on May 18th, 1888, a motion was filed for leave to file a petition for rehearing. Such motion, together with the proposed petition attached thereto as "Exhibit A," are printed in the record on pages 54, 55 and 56. At the same term, and on October 29th, 1888, by order of the Court, leave was granted to file the said petition for a rehearing, and the same was immediately filed (record, pp. 57, 58). The order of the Court granting leave to file said petition was based upon the allegation in the motion, duly verified by the affidavit of C. S. Montgomery thereto attached, to the effect "that the premises and matters in dispute are of a value less than $5,000.00." No showing was made by the appellant disputing the said allegation, in which he acquiesced, and it was assumed at all times upon the argument that said allegation as to value was true. Upon the same day that the petition for the rehearing was filed, the whole matter having been theretofore fully argued, an opinion of Circuit Judge Brewer, concurred in by District Judge Dundy, was filed, contained in the record at pages 59, 60 and 61, sustaining the petition and ordering the entry of a decree in favor of the appellee. Such decree was duly signed and enrolled (record, pp. 61, 62).

If, at the time the first decree was rendered, the property was worth more than $5,000.00, then, under equity rule 88, no re-hearing could be granted, after the term at which the decree was rendered. The motion for leave to file the petition for the rehearing was filed after the term at which the decree was rendered, and such motion was sustained and the petition admitted upon the express allegation, acquiesced in, that the property in controversy was worth less than $5,000.00. I contend that the proceedings thus set forth amount to a finding and decree in the Court below that the amount in controversy was less than $5,000.00, and that the appellant can not now be heard to dispute such result, by way of affidavits subsequently filed, or otherwise. In other words, it is not a case where at the time the decree was rendered, there was nothing in the record to show the value. The value had been shown by the motion for a re-hearing and the affidavit thereto attached, acquiesced in by the appellant, and determined by the Court. In such cases, affidavits, or other proofs, subsequent to the decree, are not admissible. The conclusion necessarily follows that the value of the property in controversy, at the time the final decree was rendered was less than

$5,000.00, and that, therefore, this Court is without jurisdiction to determine the appeal.

SECOND.

THE PROPERTY IN CONTROVERSY IN THIS SUIT AT THE DATE OF THE FINAL DECREE, AND WHEN THE APPEAL WAS SUED OUT, WAS WORTH LESS THAN $5,000.00.

A plat of the property in controversy will be found between pages 80 and 81 of the printed record, which plat, in connection with the affidavit of E. A. D. Parker, at page 81, shows the character of the land, as to cultivation and the location of the house thereon.

There are two points of view as to what the property in controversy really is, and upon which is dependent the question of value. Hence, we separate this discussion into two subdivisions.

ONE—*The matter in controversy is the land, exclusive of lasting and valuable improvements.*

It is provided by the statute of Nebraska:

"That in all cases where any person claiming title to real estate, whether in actual possession or not, for which such person can show a plain and connected title, in law or equity, derived from the records of some public office, or from the United States, or from this State, or derived from any such person by devise, descent, deed, contract or bond, such person or persons claiming or holding as aforesaid, shall not be evicted or turned out of possession of such real estate, nor shall his claim of title be set aside or canceled by any court in any proceeding brought or commenced by any person setting up and proving an adverse and better title or claim to such real estate, until such person claiming as aforesaid shall be fully paid the value of all lasting and valuable improvements made upon such real estate by such claimant or by those under whom he claims, etc."

Section 1, Chapter 63, entitled, "Occupying Claimants," Comp. Stat. Nebraska.

Following this provision the statute fixes the procedure in the State Courts for ascertaining the value of the "lasting and valuable improvements." From the gross value of such improvements, it is provided that the rents and profits of the premises received by the occupant or claimant, after notice of the successful claimant's title by service of process, shall be deducted. It is also provided by the same statute that the value of the land itself, without the improvements placed thereon by the occupying claimant,

shall be appraised, and there are also provisions for determining the amounts of taxes paid by the occupying claimant which, with interest, are to be added to the value of the improvements. Then comes Section 7 of the act, which reads as follows: "If, upon the final hearing, there shall be found a balance in favor of the occupant or unsuccessful claimants, the person proving the better title may either demand of the occupant or claimant the value of the real estate without improvements as shown by the appraisement, and tender a general warranty deed for the real estate in question to such occupant or claimant, or he may pay into court the balance so found due such occupant or claimant within such time as the court shall allow in its final decree."

It will thus be seen that the value of the lasting and valuable improvements upon the land in controversy cannot be considered in determining the amount in dispute for the purpose of deciding the question of this Court's jurisdiction. By the decree rendered, the appellee, Sherwood, recovered only the land or its value, exclusive of the lasting and valuable improvements placed thereon by the appellant, Moelle. He did not recover such improvements, or their value, but merely the option to receive them upon payment of their value. While it is not the practice of the Federal Circuit Court to follow the procedure laid down in the statute quoted, nevertheless the substantial and vested rights of the parties fixed by said statute are enforced by a special procedure, which, in the district of Nebraska, is pursued upon the equity side of the Court, regardless of whether the main case be at law or in equity. The result in the Federal Court is the same as in the State Court. The successful claimant, after proper appraisements have been made, has the option to deed the land, upon receipt of its value, or to retain the land with the improvements upon payment therefor.

The case is not analogous to those involving money demands, wherein for the purpose of determining the jurisdiction of this Court, the amount of the plaintiff's demand against the defendant may be added to the amount of the defendant's claim against the plaintiff, for, in such cases, the losing party may not only lose the amount of his demand, but also the additional amount of his adversary's claim against himself. In the case at bar, if the appellee had lost instead of won, he would have lost the value of the land alone, exclusive of improvements. As the successful person in the suit, he

gains nothing but the land, for the reason that if he takes it, he must pay for the improvements which he gets.

If this view be correct, then the solution of the question of the value of the property in controversy is simple; such value is the value of the land without improvements, which value without exception, is fixed by all the witnesses at a sum not exceeding $1,600.00.

Two—Even if the value of the lasting and valuable improvements may be considered in addition to the value of the land itself, still the amount in controversy is not shown, by a fair preponderence of the testimony, to exceed $5,000.00.

Let us first consider this from the standpoint of the appellant's own evidence. His deposition was taken October 1st, 1887, respecting the merits of the case. At that time the question of the jurisdiction of this Court was not under consideration, and probably had not even been thought of. He then testified, stating in detail the nature and amount of the improvements placed by him upon the land. (record, p. 23). He was asked the question No. 25, "You may state, if you know, what about the improvements altogether are worth?" To this he replied: "I will figure the house $1,000.00, perhaps more—the whole building—and the other improvements—my small fruits and all extra in the yard and orchard and all improvements—say $1,500.00." Thus we have his evidence that at that time all the improvements were worth $2,500.00. On cross-examination, at pages 32, 33 and 34 of the printed record, the question of his improvements and their value is presented still more minutely, the effort on our part being to discredit his valuation as excessive, but it will be seen that he adhered to it. This figure, added to $1,600.00, the value of the land without the improvements, produces the result of $4,100.00 as the aggregate value of both. It is true that in his affidavit, at page 66, sworn to January 30th, 1889, he fixes the value of the whole premises at $5,600.00; but I hardly think this estimate will be considered reliable, or as doing away with the force of his former estimate, especially in view of the fact that in the interval between his two estimates the improvements had not been increased or added to, and of the further fact that the object of the later estimate was to fix a value which would bring this action within the jurisdiction of this Court.

Let us next consider this question in view of the other evidence. Eight witnesses on behalf of the appellant, at pages 64 and 65 of the record, testify generally, by way of two affidavits, that the

whole property was worth $5,600.00. Three other witnesses, at page 89, in one affidavit, fix the value at $6,000.00. Three others at pages 93 and 94, in one affidavit, at $5,488.00; six other witnesses, in one affidavit, at pages 94 and 95, at $6,033.00; six witnesses, in one affidavit, at page 67, give the nature and value of the improvements in detail, and estimate the aggregate value of the property at $6,588.00. If the opinion of these witnesses is to be taken as satisfactory and reliable, and if the value of the improvements may be added to the value of the land, in determining the amount in controversy, then such amount, at the time the appeal was taken, exceeded $5,000.00.

But, I do not think this conclusion can be reached in the light of the evidence in the record on behalf of the appellee. By the evidence of L. P. Dosh and S. A. Searle, in four affidavits, on pages 68, 69, 70 and 71, the opinions of appellant's witnesses, D. W. Barker, E. S. Kennedy and N. H. Stoner, are very much discredited, and the value of the land, including improvements, is fixed at $3,000.00 at the most. See especially the last affidavit of Dosh and Searle, wherein they recite their conversation on the 22nd day of March, 1889, with the appellant, and give the facts and grounds upon which their opinion, as to the value of the property is based. In addition to this evidence of Dosh and Searle, we have the evidence in one affidavit at pages 71 and 72, of nine witnesses; and at page 73, in another affidavit, of four witnesses, and at page 75, in one affidavit, of four other witnesses, and at pages 76 and 77, in another affidavit, of another witness, fixing the outside value of the premises at $3,200.00. At pages 77, 78, 79, 80 and 81, are the affidavits of four other witnesses—Banks, Miller, Hobbs and Barker—fixing the outside value of the premises at $4,000.00. It appears from these affidavits that these witnesses are especially expert, and that their opinions are entitled to decisive weight. I call especial attention, also, to the affidavit of F. S. Shaw, county clerk, at page 82, showing that thirteen of appellant's witnesses, who made affidavits, were not resident freeholders of Nuckolls County.

Particular attention is also called to the affidavits of F. S. Shaw, county clerk, and R. M. Gourley, county treasurer, at pages 73 and 74 of the record, showing that the assessed value of the property in controversy, for purposes of taxation for the year 1888, was only $480.00.

Most certainly, upon the whole record as thus generalized, considering all the circumstances, the contradictory evidence of the appellant himself, and the character and number of the witnesses on both sides of the controversy, it cannot be said that the appellant has established "as a fact by a fair preponderance of the testimony, that the value of the property in dispute exceeds $5,000.00."

I therefore, respectfully submit that the motion to dismiss the appeal should be sustained.

C. S. MONTGOMERY,
Counsel for Appellee.

41 U.S. 24

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

THEODORE J. MOELLE,
Appellant.

vs.

JAMES K. O. SHERWOOD,
Appellee.

OCTOBER TERM, 1892.

Term No. 103.

BRIEF FOR APPELLANT.

BY N. S. HARWOOD, and
JOHN H. AMES,
Solicitors.

Calhoun & Woodruff, Printers, Lincoln, Neb.

IN THE

Supreme Court of the United States.

THEODORE J. MOELLE,
Appellant.

vs.

JAMES K. O. SHERWOOD,
Appellee.

OCTOBER TERM, 1892.

Term No. 103.

BRIEF FOR APPELLANT BY N. S. HARWOOD, AND JOHN S. AMES, SOLICITORS.

STATEMENT OF CASE.

On June 23, 1885, the complainant, James K. O. Sherwood filed his bill in the Circuit Court of the United States for the District of Nebraska, claiming that "at the commencement of this suit he was, and for a long time prior thereto had been, and still is, the owner in fee simple, and

entitled to the possession of the S. E. 1-4 of Section No. 31, Township No. 3, North, of Range 8 East, in Nuckolls county, Nebraska." (Record, page 1.) The complainant based his claim of ownership and right to possession upon a quit claim deed from George L. Bittinger, the patentee of the lands in controversy as follows:

I.

Nov. 1, 1871, patent from the United States to George L. Bittinger, filed for record in Nuckolls county, Dec. 31, 1883. (See Record, page 39.)

II.

Quit claim deed of date August 22, 1882, from George L. Bittenger to L. P. Dosh, filed for record Sept. 19, 1892. (See Record, page 43.)

III.

Warranty deed dated October 27, 1882, by L. P. Dosh to J. R. Dosh, filed for record, November 20, 1882. (See Record, page 44.)

IV.

Warranty deed dated June 30, 1883, by J. R. Dosh, to appellee, James K. O. Sherwood, filed for record April 24, 1885. (See Record page 47.)

There were several tax deeds set out in the bill to brace up this title, but as they were all void upon their faces and admitted to be so by complainant's answer to appellant's cross bill, it is unnecessary to consider them here.

The appellant, Theodore J. Moelle, filed his answer and cross-bill, (Record, pages 4 and 11), denying the title of said complainant to the premises, and alleging among other things, that on the 23d day of June, 1870, the said George L. Bittenger, patentee of said lands, his wife joining therein, for a valuable consideration, by warranty deed, granted, bargained, sold and conveyed said premises to one Guthrie Probyne, and that when said Bittinger executed said quit claim deed to said premises to said L. P. Dosh, he had no right, title or interest therein, and that said Probyne and wife on the 24th day of August, 1883, for a valuable consideration, made, executed, acknowledged and delivered in due form to said defendant, for a valuable consideration, a general warranty deed of said premises, and that immediately thereafter appellant went into possession thereof and made lasting and valuable improvements, and was residing thereon with his family nearly a year prior to the recording of the deed to complainant Sherwood. The records of Nuckolls county, Nebraska, show the chain of appellant's title to the land as follows:

I.

The above named patent from the United States to George L. Bittenger.

II.

Warranty deed from George L. Bittenger and wife 'to Guthrie Probyne, dated June 23, 1870, and filed for record August 20, 1883. (See Record, page 49.)

III.

Warranty deed from Guthrie Probyne and wife, to Theodore J. Moelle, dated August 20, 1883, and filed for record August 24, 1883. (See Record, page 35.

The original source of title, therefore, appears not to have been made a matter of record until December 31, 1883, after the execution of all the other conveyances here in controversy.

From the records of the county treasurer, it appears that the appellant's grantor, Guthrie Probyne, paid the taxes on the land from the time it first became taxable until 1876, and that it was then and thereafter assessed in his name.

The principal question involved in the suit is whether the title that Sherwood derives through the quit claim deed of Bittenger after he had parted with all his right, title and interest, gave him the better title and better equity.

The cause was heard before the circuit judge at the January, 1888, term of the circuit court, and on the 9th day of March, being one of the days of that term, a decree was signed and entered, dismissing the complainant, Sherwood's, bill, and quieting the title in the appellant, Moelle. (Record, page 52.)

At the following or May term of court, and on the 18th day of May, 1888, complainant filed a motion for leave to file a petition for a rehearing, (see Record, page 54), and on the 29th day of October, within two weeks from the legal expiration of the May term, a petition for rehearing

was filed, and immediately on the same day granted. (See Record, page 57, and Record, page 59, for petition and for opinion of the circuit judge granting the same. There was no subpœna issued, and no notice served upon the appellant, or his counsel, either of the motion for leave to file a petition for a rehearing, or of the pendency of the petition itself. Nor had either appellant or his counsel any knowledge of the pendency, of either the motion or the petition, until after the latter was granted. No additional testimony was taken, and no further argument was heard; and on the 8th day of November, 1888, without the knowledge of appellant or his counsel, a new decree was entered, vacating and setting aside the decree of March 9th, and quieting the title in the complainant. (See Record, page 61.) The appellant had rested secure in the belief that the decisions of the circuit court, as well as those of the highest tribunal of his own state, accompanied by a solemn decree entered upon his cross bill quieting the title in him, was a sufficient guaranty of his title, and that he need not further trouble himself concerning it, unless an appeal should be taken, or unless at least he should be notified in due time for preparation and resistance of some other appropriate attack thereon. In this, however, it seems he was mistaken, and his only remaining opportunity to be heard in defense of his twice-assured title is upon this appeal.

The petition for a rehearing does not allege that the lands in controversy were insufficient to give this Court jurisdiction upon appeal. But a motion to that effect was filed by complainant some time prior thereto. At the time of the preparation of this brief, no motion to dismiss this appeal had been made in this Court to our knowledge, and

we are not advised that it is the intent of the appellee, or his counsel to file one, but in view of the fact that a contest was had in the circuit court upon the defendant's application thereto for the allowance of an appeal, in which contest a large number of affidavits were filed, we deem it prudent to discuss the case made upon the question of values by those affidavits. There were filed altogether on this question fifty-eight affidavits, thirty six of which go to sustain the jurisdiction, or to rebut the statement of the appellee in opposition thereto, and twenty-two of which go to defeat the jurisdiction or to controvert the statements of appellant in support thereof. In view of our ignorance of the course intended to be taken by appellee, we submit the following brief analysis of the affidavits:

John C. Schearer, a carpenter and builder, who resides in Nuckolls county, testifies (Record, page 88) that he erected the house for appellant upon the lands, and that the value thereof is twelve hundred dollars ($1200.00) and that the total improvements upon the premises are worth four thousand dollars ($4,000.00), and the land without improvements, sixteen hundred dollars (1,600.00), making a total valuation of five thousand six hundred dollars ($5,600.00).

Henry A. Rice, T. C. Munger and George B. McClellen testify (Record, page 89) that they are freeholders in said county and personally acquainted with the land, and that the value thereof, including improvements, is six thousand dollars ($6,000.00.)

A. W. McReynolds, ex-county treasurer, J. H. Pritts, county judge, J. P. Hammond, county clerk, A. H. Bowman, sheriff, and E. S. Kennedy, justice of the peace, all of

Nuckolls county, severally testify (Record, page 65) to their knowledge of real estate values, and the value of this tract in particular, and say that in their opinion the lands in controversy are well worth five thousand six hundred dollars ($5,600.00).

James M. Campbell, dealer in real estate, (Record, page 65), D. W. Baker, attorney at law and dealer in real estate (Record, page 87), and H. W. Short, dealer in real estate, place the value at five thousand six hundred dollars ($5,600.00.)

Charles E. Reid, dealer in nursery stock, William Spruck, real estate owner and farmer, Louis Schumon, farmer, P. Kippenbender, farmer, N. H. Stoner and Henry Limke, farmers, living in the vicinity of the land, itemize the value as follows (Record, pages 66 and 67):

160 acres of land at $10.00 per acre	$1,600.00
110 acres of breaking and plowing at $3.00 per acre	330.00
Farm house	1,200.00
Pasture	100.00
Out buildings	500.00
Two wells and wind mills	200.00
140 apple trees at $6.00, five years standing	840.00
90 apple trees at $3.00, five years standing	270.00
36 pear trees at $8.00, five years standing	288.00
20 plum trees at $2.00, five years standing	40.00
10 cherry trees at $2.00, five years standing	20.00
All kinds of shrubbery and small fruit	100.00
300 grape vines at 50c	150.00
1000 Russian mulberries, bearing, at 20c	200.00
2,000 ash at 5c	100.00
1,500 catalpa specioza at 10c	150.00
500 black walnuts at 10c	50.00
1,000 poplars at 5c	50.00
5,000 eastern yellow cottonwoods at 5c	250.00
1,500 box elders, soft maple, hackberry and evergreens	150.00
Total	$6,588.00

V. A. Thomas, W. B. Crawford, Ira B. Kemerer, E. T. Worden, J. W. Carnes and G. A. Wilkins, who are prominent citizens of the county, gave the value at six thousand and thirty-three ($6,033.00). (Record, page 94.)

T. P. Landen, a nurseryman of large experience, makes the following affidavit as to the value of trees of the age and growth of those on the lands in controversy (Record, page 92):

Apples seven to eight years old	$ 3.00
Pears nine years old	10.00
Plums nine years old	2.50
Cherries seven to nine years old	3.00
Grapes five years old	.50
Russian mulberry	.20
Ash	.07
Catalpa	.10
Black Walnut	.10
Poplar	.05
Yellow cottonwood, soft maple and box elder	.10

O. V. Ingersoll, W. R. Knapp, ex-county judge; and Springer Galbey all give itemized statements, (Record, page 93,) showing the value at five thousand, four hundred and eighty-eight dollars ($5,488.00.) To rebut these valuations the appellee offers the affidavit of H M. Banks, who places the value at four thousand dollars ($4,000.-00); also J. H. Tood, F. P. Bonnell, A. C. Corkle, and J. W. McElhenney, who place the value at three thousand, two hundred dollars ($3,200.00.) (Record, page 75.) J. W. Small places the value without improvements at $10 per acre. (Record, page 76.) Neri Connor, who places the value at three thousand, two hundred dollars, ($3,200.00) (Record, page 76): E. D. Hobbs, real estate dealer at Nelson, at three thousand, nine hundred and thirty-seven dol-

lars and fifty cents ($3,937.50) (Record, page 79): E. A. D. Parker, at four thousand dollars ($4,000.00) (Record, page 81). While the last witness shows knowledge of lands in that vicinity, he claims no special knowledge of the value of any improvement of the character of those upon this land, and says that the difference of a mile or a mile and a half in location, with reference to depot does not affect the value.

J. A. Miller, a real estate dealer at Nelson, places the value at four thousand dollars ($4,000.00.) (Record, page 77.)

Joseph E. Haught, Rudolph Frey, Sam Hunzicker, J. W. Honeycutt, Grant Gregor, John Matzener, Luke Dawson, Fred Obenrider, S. S. Woodard, C. Newman, William Shaw, James Morton, and W. H. H. Miller, place the value at three thousand, two hundred dollars ($3,200.-00) with improvements: without improvements at ten dollars ($10.00) per acre. (Record, pages 71-73.)

These are followed by the affidavits of the county clerk and county treasurer, as to the amount of taxes paid, and the assessed value, but it is a well-known fact that improved farm lands are assessed at nearer one-tenth than one-third their true value, besides, on account of the planting and cultivation of timber, there are certain exemptions from taxation, as will be seen from the affidavit of the county Clerk. (Record, page 82.)

In addition to the foregoing, there are several affidavits from one L. P. Dosh (Record, page 69), who travelled over the county with one S. A. Searle, notifying persons

who had theretofore made affidavits and filed them in this case, and making affidavits as to what these witnesses said to them. The identity of this person's name with that of L. P. Dosh, the grantee in the quit claim deed from Bittenger is significant. He evidently feels himself under obligation to fortify the complainant's title, and finds it easier to relate what the parties say to him than to procure the affidavits of the witnesses themselves.

In rebuttal of appellee's affidavit, appellant shows:

First, by the county clerk, Frank S. Shaw, (Record, page 82), that the affiants, S. S. Woodard, Fred Odenrider, Luke Dawson, Grant Gregor, John Matzener, Rudolph Frey, James Haught, Samuel Henziker, Charles Newman, H. M. Banks, J. A Miller and E. A. Parker, are not resident free holders of Nuckolls county.

Second, by the affidavit of Moelle, (Record, page 84), that J. H. Todd, F. P. Bonnell, J. W. McElhenney, G. B. McClelland, live twenty miles away, and have never been upon the land or seen the improvements; that S. S. Woodard is a woman over seventy years of age; that Grant Gregor is a minor.

The affidavits of many of the appellee's witnesses were taken by the attorney, Searle, out of the county of his residence, and where he had no jurisdiction to administer an oath, to-wit:

Those of S. S. Woodard, Grant Gregor, Luke Dawson, John Matzener, Fred Obenrider, James Haught.

D. W. Barker swears (Record, page 87), that he never

made the statement made by Dosh, and never wrote the letter attached to the latter's affidavit.

N. H. Stoner, who made an affidavit on behalf of appellee on March 9, 1889, afterwards filed an affidavit (Record, page 86), that he had in his former application no special reference to the Moelle land but that he was familiar with it and believed it worth with improvements five thousand, six hundred dollars ($5,600.00.)

Neri Connor, who made an affidavit on March 18, 1889, states in another made on the 28th. (Record, page 82): that he did not understand when he made his former affidavit that the land in controversy was referred to: that he had never been in the orchard or examined the trees, and did not include them in his estimate.

There are no questions of value so difficult of solution as those of real estate. It is seldom that two men can be found that will put the same, or anything like the same, value on a tract of land.

In this case however, there is a remarkable agreement as to the value of the raw land. The witnesses practically all agree that it is worth ten dollars ($10.00) per acre. The differences arise in estimating the value of the improvements. To the speculator, or the man who is seeking to drive a sharp bargain, trees, orchards, barns, cribs, pasture lands, wells, windmills, et cetera, count for little, but the resident farmer, who knows the cost of these things, the years of toil and care required for their procurement and preservation, estimates them highly. Only one who has had practical experience in attempting to subdue a raw

farm upon a western prairie and in the planting and cultivation of trees thereon, can be a fair judge of their value.

It seems to us that upon a candid examination of these affidavits any impartial person must conclude that the great preponderance is in favor of a value exceeding five thousand dollars ($5,000.00), and in view of the circumstances under which the decree in this case was rendered, we cannot believe that the court will seek an opportunity to cut off the view.

In Gage vs. Pumpelly, 108 U. S., page 164, the opinion of the court is as follows:

"Many of the affidavits sent up with the transcript "state that the value of the property which is the matter in "dispute, exceeds five thousand dollars ($5,000). When "an appeal has been allowed after a contest as to the value "of the matter in dispute, and there is evidence in the Re-"cord which sustains our jurisdiction, the appeal will not be "dismissed, simply bacause upon examination of all the affi-"davits we may be of the opinion that possibly the estimates "acted upon below were too high. There is no such de-"cided preponderance of the evidence in this case against "jurisdiction as to make it our duty to dismiss the appeal "which has been allowed."

ASSIGNMENTS OF ERROR.

The appellant assigns for error in the record in this cause—

First: That the court erred in entertaining the motion for leave to file the petition for rehearing, filed on the

18th day of May, 1888, after the adjournment of the term at which the final decree had been entered.

Second: That the court erred in permitting a petition for a rehearing to be filed at the May term of the court, being the term subsequent to that at which the final decree had been entered.

Third: That the court erred in entertaining and granting a petition for a rehearing on the day on which it was filed, to-wit, the 29th day of October, 1888, *ex parte*, and without service of process or notice upon the appellant or his counsel, either of the pendency of said petition or of his motion for leave to file the same.

Fourth: That the court erred in entering a decree vacating and setting aside the former decree on the eighth day of November, 1888, *ex parte*, and without notice to the appellant or his counsel and without their having had an opportuni y to be heard.

Fifth: That the decree of November 8th is in violation of law, and contrary to the undisputed facts disclosed by the proofs and apparent upon the face of the record.

Sixth: That it was error in any event to deprive appellant of his title and possession without compensation for his permanent and valuable improvements guaranteed to him by the Nebraska statutes.

BRIEF.

I.

Upon the foregoing record we contend, first, that the Circuit Court had no jurisdiction to grant or entertain an application for a rehearing, or to vacate or set aside the decree of the 9th of March, 1888, after the lapse of the term at which it was signed and entered. This seems to be put beyond controversy by the 88th equity rule, and by this court in

Cameron vs. McRoberts, 3 Wheaton, 590.
McMicken vs. Perrin, 18 Howard, 507.

And even if the court had the power, it did not exercise it in such manner as to acquire jurisdiction over the parties. Leave to file an application was not asked for until after the expiration of the term at which the decree was entered, and although the application is in the form of a petition, it was in effect a mere motion. No subpœna was issued upon it nor had applicant at any time any notice, oral or in writing of its pendancy, or of the pendancy of the motion for leave to file it, and it was filed and granted on the same day, to-wit, the 29th day of October, 1888, (See copy of Circuit Court Record, pages 57 and 59), and it was finally disposed of *ex parte*. This practice was in violation of every rule of procedure, laid down by Mr. Justice Field, in

Giant Power Company vs. Cal. V. P. Co., 5 Fed. Rep. 197, S. C. 6 Sawyer, 509.

It does not cure the defect to say what is doubtless the fact,

that the circuit judge pursued this course through inadvertence, and in reliance upon the supposition that counsel for complainant had taken the steps with reference to notice, indispensable to jurisdiction. The infraction of the rules of practice and the consequences to appellant are quite unaffected by that fact.

II.

If the foregoing point is well taken, nothing further remains to be said, but out of abundant caution, as we think, we will discuss the merits of the two contradictory decrees rendered by the circuit court, and endeavor to show that the earlier of them is correct.

The later decree and its accompanying opinion are based upon the proposition that a chain may be stronger than its weakest link. If this be true, the logic of the law differs from that employed in every other science. It is conceded, as indeed it must be, in deference to the opinions of this court, and of the courts of the state of Nebraska, and of nearly every state in the Union, that a grantee in a quit claim deed is not to be regarded as a bona fide purchaser in any sense. This is the point expressly ruled in the following cases :

In the Lincoln Building and Saving Association vs. Hass, a case in some respects very similar to the one at bar, the court say : "The effect of a quit claim deed is only "to pass the naked legal title, and changes no equities of "the parties ;" and in Pleasants vs. Blodgett, 32 Nebraska, 427, decided at the January, 1891, term, the court say : "In

"Hoyt vs. Schuyler, 10 Neb. 657, it was said the 'very form "of conveyance by quit claim repels the inference of a bona "fide purchaser.' The purchaser bought an interest which had "previously been conveyed to another, and the grantee under "the quit claim thereby took nothing." But is it a rule of law requiring the citation of authorities for its support, that a purchaser of real estate however remote is charged with notice of whatever appears in his grantor's chain of title? And is not an instrument in the chain which "repels the inference of bona fides" on the part of a grantor, however remote, a fact which should at least put him upon his inquiry? And does not the knowledge of any fact which should put an intending purchaser upon inquiry deprive him of his character of bona fides? It seems to us that to ask these questions is to answer them and to demonstrate the absurdity of the assertion that the grantee, holding by quit claim deed is in any better plight than his grantor. If the above quoted language of the Supreme Court of Nebraska may be trusted, the case is that of a purchase from one whom the purchaser knows, or has good reason to suspect, is a fraudulent grantee. How, then, is the opinion in Snowden vs. Tyler, 21 Neb., 190, to be reconciled to the above quoted decisions, both prior and subsequent thereto? Has the Supreme Court of Nebraska been betrayed into an absurdity? Nay, verily. The propositions in the opinion last cited, upon which the circuit judge relied in granting the application for a rehearing, and in vacating the former decreed, are merely the obiter dicta of Judge Maxwell. Neither the doctrine enunciated nor its opposite affected or could affect, or have any bearing upon the questions at issue in Snowden vs. Tyler. The grantee in the quit claim deed in that action had previously acquired the equitable title to

the lands in controversy by purchase thereof for their full value from the adult heirs and administrator of Snowden, deceased, who was a grantee by a full covenant warranty deed, then mislaid and not of record, and supposed to be lost or destroyed, by Shirk, a former owner. To support this equity he procured a quit claim deed of the lands from Shirk. The lands were afterward conveyed by warranty to divers purchasers for full value in good faith. Those of the heirs at law of Snowden who were minors at the time of the transaction first recited, upon attaining their majority, caused the supposed lost deed to be made of record, and attacked the title of these innocent grantees. The equities of the latter were at least equal, if not superior, to those of the heirs who in their minority had consented to the sale and conveyance, and who had received the benefit of their shares of the consideration money. The apparent legal title of record was in the grantees, and in accordance with a familiar rule of equity jurisprudence, they having also an equal and superior equity were permitted to prevail. And this is the extent we believe to which courts have gone in giving force to quit claim deeds as against adverse claimants. Such deeds have been laid hold of in some instances to prevent a failure of justice when those claiming under them were otherwise entitled in equity, and the quit claim was necessary to unite the legal with the equitable title. We do not believe there is any judicial support for the doctrine in law or logic that a chain may be stronger than its weakest link. If so, all the evils depicted by Judge Valentine in Johnson vs. Williams, 37 Kansas, 179, as likely to arise from the reckless and fraudulent making of quit claim deeds will follow without hindrance. If the grantee by quit claim can safely convey by warranty the industry of

encumbering and stealing titles will be greatly encouraged and largely augmented. The fraudulent parties, the grantor and the grantee, by quit claim, require for their success nothing more and nothing better than a "bona fide purchaser," who will be conveniently oblivious of everything but the public record.

III.

There is still another reason, or rather there are two other reasons why the doctrine above combatted even if adopted by this court, is inadequate to support the final decree of the circuit court.

First: The patent from the United States to Bittenger was not at the time of the execution of the quit claim deed, nor at the time of the execution of the subsequent deed to the complainant, or of the diverse mesne conveyances, of record anywhere, but during all that time was in the possession of Bittenger's grantee by warranty, Appellent's Grantor Guthrie Probyne. This fact is not only sufficient as it seems to us to rebutt the allegation of bona fides, but it proves to be false complainant's testimony, that, before purchasing, he caused the county records to be examined and was advised and believed that they evidenced a clear title in J. R. Dosh. They evidenced no title anywhere and the absence of the record of the patent would have put any ordinarily prudent and honest man upon his inquiry to ascertain the possession and ownership of this all-important muniment of title. No inquiry appears, however, to have been made, even of Bittenger, whose whereabouts and accessibility was known to all concerned. Such an inquiry would doubtless have elicited the facts.

Second: The quit claim deed from Bittenger and wife to L. P. Dosh, does not purport to convey the land, but only "all the right, title and interest" of the grantor "in and to the same." And it contains no covenants of warranty, even of that which it purports to convey. It purports upon its face to convey less than the fee. What interest or title, if any, it did convey was necessarily left to be ascertained by parol, or by other muniments of title. It would not even have prevented the grantor, Bittenger, from acquiring the title of his former grantee, Probyne, and setting it up adversely to his own grantee by quit claim, L. P. Dosh. This point was expressly ruled by this court in

Hanrick vs. Patrick, 119 U. S., 156,

in which the court say:

"The covenant of warranty in the deed to Sargent, how-"ever, relates only to the premises granted, which the gran-"tors agree to warrant and defend, and the premises are des-"cribed as 'one undivided half of all my right, title and in-"terest in and to the following described lands,' and cannot, "therefore, operate as an estoppel, preventing the grantors "from asserting any subsequently acquired title."

The conveyance and the covenants are both confined to the right, title and interest, expressly referred to and described in the deed of February 1, 1878, as the interest conveyed by the deed from Jenkins. There is no recital in the deed to estop her as to the character of her title or the quantam of interest intended to be conveyed within the rule laid down by this court in

Van Resseler vs. Kearney, 11 How., 297.

In the absence of such recital a covenant of general warranty, where the estate granted is the present interest and title of the grantor, does not operate as an estoppel to pass a subsequently acquired title.

The rule on that point seems well stated by Mr. Rawle, Covenants for Title, 4th E. D., 393, in the following language:

"Where the deed, although containing general cove-"nants for title, does not on its face purport to convey an in-"defeasible estate, but only the right, title and interest of the "grantor, in cases where those covenants are held not to as-"sure a perfect tiele, but to be limited and restrained by the "estate conveyed the doctrine of estoppel has been considered "not to apply: in other words, although the covenants are, "as a general rule, invested with the highest functions of an "estoppel in passing, by mere operation of law, and "after an acquired estate, yet they will lose that attribute "when it appears that the grantor intended to convey no "greater estate than he was possessed of."

White vs. Brokaw, 14 Ohio, S. T., 339, 343.

Adams vs. Ross, 1 Vroom (30 N. J. L.) 505, 509.

Blanchard vs. Brooks, 12 Pick., 47.

Brown vs. Jackson, 3 Wheat, 449, 452.

Suppose now that the grantee of L. P. Dosh, viz: J. R. Dosh, and the grantee of the latter, the complainant, holding under warranty deeds are to be treated as bona fide purchasers: the question then arises: of what? If it be conceded that a chain may be stronger than its weakest

link, may we not still successfully invoke the induction of physical science that a stream cannot rise higher than its source? If a covenant of warranty in the quitclaim would not have enlarged the estate conveyed thereby, as is held in Hanrick vs. Patrick, *supra*, where is the magic of the grantee's warranty to have that effect? And if the grantee by quit claim might have successfully set up the adverse title to the fee, why might not his former grantee Probyne, or the grantee of the latter, the appellant, be permitted to do so? Suppose Bittenger's quit claim deed had purported to convey an aliquot interest, say an undivided one-half, would the subsequent warranties have enlarged it into a conveyance of the whole? It seems to us that to ask these questions, also, is to answer them.

In Oliver et al. vs. Piett, 3 Howard, 333, this Court say: "Another significant circumstance is that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest, in the property; and under such circumstances it is difficult to conceive how he can claim protection as a bona fide purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts."

In May vs. LeClaire, 11 Wallace, 217, this Court say:

"On the 27th day of July, 1859, Dessaint conveyed by a deed of quit claim to Ebenezer Cook. The evidence satis-

fies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quit claim deed, he cannot be regarded as a bona fide purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. Cook occupied the same relations to the property as Dessaint, his grantor."

IV.

The statute of Nebraska provides, section 1, page 601 of the Compiled Statutes of 1891, "That in all cases where any person claiming title to real estate, whether in actual possession or not, for which such person can show a plain and connected title in law or equity derived from the records of some public office, or from the United States, or from this state, or derived from any such person by devise, descent, deed, contract, or a bond, such person or persons, claiming or holding as aforesaid, shall not be evicted, or turned out of possession of such real estate, nor shall his claim or title be set aside, or cancelled by any court in any proceedings brought or commenced by any person setting up and proving an adverse and better title or claim to such real estate, until such person claiming as aforesaid shall be fully paid the value of all lasting and valuable improvements made upon such real estate by said claimant or by those under whom he claims."

It is not denied that the appellant occupied the premises under a plain and connected title, such as is intended by the statute, and it is undisputed that during such occupancy he made lasting and valuable improvements thereon, the

value of which is variously estimated at from two thousand five hvndred dollars ($2,500.00) to four thousand six hundred dollars ($4,600.00). Of these, the decree complained of deprives him absolutely. This was, of course, erroneous, and should the decree be affirmed so far as respects the title to the land, it should be modified so as to protect the appellant to the value of his betterments, but we do not believe that it would be affirmed in any respect.

N. S. HARWOOD,
JOHN H. AMES,
Solicitors for Appellant.

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vs.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1892.

THEODORE J. MOELLE,
Appellant,

vs.

JAMES K. O. SHERWOOD,
Appellee.

} TERM NO. 103.

BRIEF OF C. S. MONTGOMERY,

Of Counsel for Appellee.

RABER, PRINTER, ROOM 8, N. Y. LIFE BUILDING.

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Appellee.

TERM NO. 103.

BRIEF OF C. S. MONTGOMERY,
Counsel for Appellee.

The statement of the case by counsel for appellant in their brief is, in general, correct, and so far as it is correct, I will not repeat it. It is erroneous, however, in the following respects:

FIRST. The deed from J. R. Dosh to appellee, described under subdivision IV., on page 2, is dated January 30th, instead of June 30th, as stated.

SECOND. Under subdivision II., at the bottom of page 3 of their brief, reference is made to the deed from Bittenger to Probyne, at page 49, as being the deed through which the appellant claims: this is incorrect. The deed at said page is a certified copy of the deed as *originally* made from Bittenger to Probyne, June 23rd, 1870, and as recorded in the deed records of Jefferson county, January 3d, 1871, in book "E" at page 116. (See certificate of J. T. Thompson, county clerk, Record p. 51). This certified copy of deed was introduced in evidence by appellee, as complainant, to

show that the deed when *originally* made and recorded, did not convey the land in controversy, namely, southeast quarter of section thirty-one (31), but that in fact, it conveyed the southwest quarter of section thirty-two (32). The deed offered in evidence by appellant, as defendant in the court below, is not in the record; the offer of the deed is found in the record at pages 21 and 22, and the deed was objected to, on the ground that the description of the property has been changed, so as to include the land in controversy. The changes in the deed were two; the word "southwest" was changed to read "southeast," and "thirty-two," the number of the section, was changed to read "thirty-one." In reality, so far as the record in this court shows, there is no chain of title from the patentee, Bittinger, to appellant Moelle, but, in fact, a deed was introduced in evidence, from Bittenger to Probyne, showing upon its face the said changes, which were explained by the testimony of Probyne, found in the record on pages 18 and 19. By reason of the facts in this record, I claim that the appellant had in the court below, and has in this court, no standing. I will discuss this question later, in my brief of the argument.

THIRD. In the third paragraph on page 4 of the brief of appellant's counsel, it is stated that Guthrie Probyne paid the taxes on the land from the time it first became taxable until 1876, and that it was then and thereafter assessed in his name. These statements are not correct. The record does not show in whose name the land was assessed for taxation, and there was no proof, or showing, on the subject. The fact is, according to my recollection, that the land was never assessed in Probyne's name, but that it was always assessed in Bittenger's name, until at least after the tax deed referred to was made and delivered to Furst. In the absence of a showing in the record on the matter, I presume that my statement will at least off-set that of opposing counsel in this regard. As to payment of taxes I refer to the printed record, pages 37, 38 and 39, containing copies of the receipts for all taxes paid by Probyne. The first receipt on page 37, recites that he paid the taxes for the year 1876,

This is clearly an error, and 1876 should read 1871, because the receipt is dated October 16th, 1872, at which time, of course, a tax could not have been assessed for 1876. Further than this, it appears from the tax deed, at page 45, that the land was sold to James Grant for the taxes of 1875, and subsequent taxes were paid, either by Grant or Furst, pursuant to said tax sale, up to 1884. The taxes in reality paid by Probyne were for the years 1871 to 1874, both inclusive. From 1875 to 1883, they were paid by the tax purchaser and his assignee, Furst. Subsequent thereto, they were paid by the appellee, Sherwood.

FOURTH. It is stated by appellant's counsel, on page 5 of their brief, that neither the appellant, nor his counsel, had any notice of the motion for leave to file a petition for a rehearing, or of the pendency of the petition itself, and that neither appellant nor his counsel had any knowledge of the pendency of either the motion or the petition until the latter was granted, and that no further argument was heard, and that the new decree was rendered without knowledge of appellant, or his counsel. These statements are absolutely untrue. In view of the high character of appellant's counsel, I can only explain these rash statements by the fact that the brief in this Court must have been written by Mr. Ames, who took no part in the proceedings, or with reference to the suit in the Court below, and is probably, therefore, ignorant of the facts, and makes his statements because the record does not show notice, and fails to show when the argument upon the motion and the petition was had. Mr. Harwood, who had exclusive charge of the suit in the Court below, will not deny the statements made by me hereinafter with reference to this matter. Having retired from active practice at the bar, I assume, out of respect for his reputation, that he is ignorant of the statements contained in the brief. I will give this matter further attention in my brief of the argument.

It is true that the petition for rehearing does not itself state that the value of the lands in controversy was insufficient to give this Court jurisdiction upon appeal, but this statement is made in

the motion for leave to file petition for rehearing, (page 54 of the record). This practice certainly conforms to the provisions of equity rule 88. It appeared from the motion, and I contend from the evidence of Moelle himself, that the value of the property in controversy was insufficient to justify an appeal to this Court. Upon the basis of such showing the leave to file the petition was granted, which, in itself, was in turn sustained, as shown by the record.

FIFTH. The question of the value of the property in controversy, discussed by counsel on pages from 6 to 12 of their brief, has been sufficiently presented in the brief filed by me in support of my motion to dismiss the appeal. Further discussion of that subject is unnecessary here.

BRIEF OF THE ARGUMENT.

I.

Subdivision I. of the brief of appellant's counsel is based upon the proposition that no notice was given to appellant, or his solicitors, of the pendency of the motion for leave to present the petition for rehearing, and that the motion and petition were granted *ex parte*.

Responding to this proposition, the first question which presents itself is, how are the facts in this regard to be determined? Are the statements of counsel in any form, to be taken, or must it be determined upon the record? And if upon the record, what is the presumption? Is it, in the language of counsel, "that the Circuit Judge pursued this course through inadvertance," or that the Court acted properly, and with due consideration, upon a proper showing? I am prepared to meet counsel from either point of view, and do so as follows:

ONE. It appears from the record that the motion for leave to file the petition was filed May 18th, 1888. The facts are that on the same day I wrote and mailed a letter to appellant's counsel, giving them notice of the filing of said motion, and enclosing with such

letter to them a copy of the motion, and of the petition. The receipt of this letter and papers was acknowledged to me personally by Mr. Harwood. Immediately afterwards, in open court, at the calling of the equity docket, by Mr. Justice Brewer, then at the Circuit, and in the presence of Mr. Harwood, I requested that an argument of the motion and of the petition be had by the full bench; to be composed of the Circuit and District Judges. This application was granted. On May 25th, the whole matter was argued orally before both judges, Mr. Harwood appearing and presenting an elaborate argument. At the conclusion of the argument the motion and petition were taken by the judges under advisement until October 29th, and Mr. Justice Brewer, as Circuit Judge, presented the opinion, commencing at page 59 of the record, which was concurred in by District Judge Dundy and filed. Unfortunately the record does not show this argument and submission, by reason of the failure of the clerk to enter it. But I am prepared to verify the above statements upon oath, and do not think they will be disputed by Mr. Harwood, and I am quite confident that both Mr. Justice Brewer and District Judge Dundy will recollect the circumstances substantially as I state them. It might be said, although I think without effect, that notice by mail in the manner above stated, would not be sufficient, but certainly, notice is waived by the general appearance of counsel and his argument at the bar.

Two. It cannot be said that the record is silent upon this subject. In the first place, the Circuit Judge, at the beginning of his opinion, (record page 59), says: "This case is now submitted on petition for rehearing." Again, the decree in the record, at page 61, recites that the cause "was argued by counsel." Certainly these recitals cannot be construed to mean that the case was submitted *ex parte*, or that it was argued by counsel only upon one side. I submit that it must be conclusively presumed as the fact is that counsel for both parties argued and submitted the case. It will not be presumed that both the Circuit and District judges acted in-

advertantly or upon any false presumption; on the other hand, the presumptions must be held all in favor of the regularity and legality of the Court's proceedings.

THREE. The cases of *Cameron vs. McRoberts*, 3 Wheat., 590, and *McMicken vs. Perrin*, 18 How., 507, are not in point. In those cases simply motions were filed to vacate the decrees rendered at the former term, and it does not appear that any attempt was made to bring the cases within equity rule 88. In the present case, the motion was filed for leave to file the petition provided by equity rule 88. The ground of the motion was, that the value of the property in controversy was insufficient to justify an appeal to this Court. Upon this ground the petition was admitted before the end of the term succeeding that at which the first decree was rendered. Said petition was not verified, because no facts were therein stated "not apparent on the record." It appeared then, and it appears now, from the record in this Court, that the motion was well founded. The value of the property in controversy then, and subsequently, when this appeal was taken, was less than $5,000.00, as shown by the argument in my brief, supporting the motion to dismiss, to which, before I conclude, I will add some further suggestions, in view of the possibility that the motion will not have been determined at the time of the submission of this cause upon its merits.

FOUR. The fact that the motion appears to have been sustained, the petition filed and sustained, and the decree ordered, all on the same day, cuts no figure. This arises because, by agreement, the argument upon the whole matter was had at one time, with the understanding that either the motion should be denied and the first decree upheld, or it should be sustained, together with the petition, and a new decree rendered by one and the same order and judgment of the Court.

FIVE. All this matter would seem to be immaterial, however, in this Court. The suit is here for final disposition by this Court, as equity and the rights of the parties may require, *provided* this Court has jurisdiction. If the Court be without jurisdiction, then

the decree in favor of the appellee must stand; but, if the Court have jurisdiction, then it will render a decree in favor of the party entitled thereto upon the record.

II.

It is claimed by appellant that his title is better than that of the appellee, because in the latter's chain of title the deed from Bittenger to L. P. Dosh is a quit claim deed. The basis of this claim is, that the grantee in a quit claim deed cannot be a *bona fide* purchaser, and that no subsequent purchaser, regardless of how many transfers may have been made of the property, can get a better title than the grantee in the quit claim deed. In support of this proposition the authorities are cited and the argument of counsel presented on pages from 15 to 21, inclusive, of their brief. I answer the argument and comment upon the authorities, as follows:

The determination to be reached depends largely, if not wholly, upon the statute and decisions of the Supreme Court of Nebraska. Said decisions, as well as authorities elsewhere, make a clear distinction between the cases where the grantee in the quit claim deed and his title are attacked, before he has conveyed to third parties, and those wherein the rights and titles of third parties are concerned, who have purchased in good faith and for value and received warranty deeds directly, or through mesne conveyances, from the grantee in the quit claim deed. In the latter class of cases, the authorities, without exception, seem to be in favor of the protection of the subsequent purchaser for value without notice, claiming under a warranty deed, whether directly or through mesne conveyances, from the grantee in the quit claim deed. In the former class of cases, the authorities, including the decisions of this Court, are generally adverse to the validity of the title of the grantee in the quit claim deed. This Court has never determined the question in a case like the one at bar, where the party attacked is a purchaser for value, claiming through a warranty deed, subsequent to the quit claim deed. In the cases decided by this court, the facts and cir-

cumstances outside the quit claim deed have been adverse to the alleged *bona fide* character of the claimants under such deed.

The first case where the question arose seems to have been that of *Oliver vs. Piatt*, 3 How., 333. The question is discussed in the opinion at pages 409 and 410. The result in that case clearly would have been the same if the question of the quit claim deed had not arisen. Williams was held, upon the facts, not to have been a *bona fide* purchaser without notice. The fact that he claimed under a quit claim deed was incidental only, and that fact seems to be mentioned as simply an added reason for the conclusion that he was not a *bona fide* purchaser. In the case of *May vs. Le Claire*, 78 U. S., 217, while it is declared by the Court that "a purchaser by deed of quit claim simply, is not regarded as a *bona fide* purchaser without notice," it nevertheless appears that the claimants under the quit claim deed were held to have had full notice of the frauds and infirmities of title, by reason of which it was urged that the holders under the quit claim deed took nothing. So, also, in the case of *Villa vs. Rodriguez*, 79 U. S., 323; and also in the case of *Dickerson vs. Colgrave*, 100 U. S., 578, wherein the possession of the defendants of the property in controversy is held to have been notice to the plaintiff of their rights. The case of *Hamrick vs. Patrick*, 119 U. S., 156, is subject to similar criticism, as not applicable to the case at bar.

I do not wish to be understood, however, as disputing the proposition that it is the general rule in this Court, and elsewhere, that the grantee in a quit claim deed cannot be considered as a *bona fide* purchaser without notice. The contention is merely, that the rule is not applicable to a subsequent purchaser for value, in good faith, without notice, other than the fact of the quit claim deed of the outstanding unrecorded title, or equity, and that the cases cited in this and other Courts, do not settle the question as to such subsequent purchasers. It is a matter of common knowledge, of which this Court, without impropriety, may take judicial notice, that all through the country, and especially in the west, there are hundreds, if not

thousands, of titles in which quit claim deeds occur. If the rule contended for by appellant's counsel be correct, then no person can safely purchase a piece of real estate, if there be a quit claim deed in the chain of title. Probably in a large majority of such cases, there is no outstanding equity, but a purchaser would have no basis upon which to determine whether or not, in any particular case, there was an outstanding equity, hence in no case could he safely purchase. Further than this, even if he did know that an outstanding equity was not in existence, he would not desire to purchase, because his title would be defective of record, and therefore, the property would not be marketable, or a basis of credit. For these reasons, and others incidental thereto, suggested by the authorities to be cited, public policy requires the rule, respecting the effect of the quit claim deed as notice, to be limited, in any event, to the grantee in the quit claim deed.

In Michigan the following rule is adopted: A defendant's title, resting on priority of record of a second deed, will prevail against that of a plaintiff who claims through a prior unrecorded deed from the same original grantor, *provided* any one of the subsequent *mesne* purchasers through whom such defendant claims title purchased in good faith, and for a valuable consideration, without notice of the prior unrecorded deed.

Shotwell vs. Harrison, 22 Mich., 410.

In Iowa the rule is stated as follows:

"The grantee of land by a warranty deed is not affected by the fact that his grantor held by a quit claim only, but is presumptively a *bona fide* purchaser, and takes the title free from outstanding equities, of which he had no notice."

Winkler vs. Miller, 54 Iowa, 476.

In the same case the Court says:

"It is not unreasonable to conclude that a quit claim deed occurs in the line of many titles, where there is no outstanding equity. If the rule contended for by the plaintiff should be held, it would tend directly to impair the selling value of all such property. The rule might operate also to hinder improvements, especially where large sums of money were requisite. It is the policy of the law that titles

to real estate should become matters of certainty as far as possible."

This decision in Iowa carries greater weight, in view of the fact that the court holds, as a general rule, that one who takes as grantee in a quit claim deed, is chargeable with notice of outstanding equities.

Weston vs. Phelps, 40 Iowa, 482.

Springer vs. Bartle, 46 Iowa, 688.

After all, however, the result in this case must be largely, if not wholly, dependent upon the statute and decisions in Nebraska. The land being located in Nebraska, its title should be determined by the laws of Nebraska. Especially is this true in the absence of an adjudication upon the subject in this Court.

The statute of Nebraska upon the subject is as follows:

"All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded; *provided*, that, such deeds, mortgages, or instruments shall be valid between the parties."

Sec. 16, Chap. 73, *Compiled St. of Neb.*, 1891, page 647.

It will observed that, under the provisions of this statute, a purchaser does not acquire his title until his deed is recorded, at least so far as subsequent purchasers in good faith without notice, are concerned. The form of the subsequent purchaser's deed is not mentioned, and it would seem to be a forced construction to urge that the grantee in a quit claim deed could not, under any circumstances, be a purchaser in good faith without notice. If, *in fact*, a purchaser has no notice of an outstanding deed, or equity, and purchases in good faith, the form of his deed ought not to effect his status. I contend that such is the rule in Nebraska, and that it is not in all cases held that the grantee in a quit claim deed is charge-

able with notice, and not subject to protection, as a *bona fide* purchaser. In fact, the rule in Nebraska certainly is, that the grantee in a quit claim deed is only *prima facie* chargeable with notice of outstanding equities, and that he may, by proof, overcome such *prima facie* effect of his quit claim deed, and show that he is, in fact, a purchaser in good faith without notice. If he makes such showing, he is protected. A subsequent purchaser, taking through a warranty deed, is always protected, unless it appears that he had *actual* notice of the outstanding title or equity.

The first case is that cited by appellant's counsel, entitled *Lincoln Building and Saving Association vs. Hass*, 10 Neb., 584. In that case William Chapin undertook to convey the land in controversy to William F. Chapin, but by mistake, omitted the land from the description in the deed, which covered other lands, also. William F. Chapin then mortgaged to the Lincoln Building and Saving Association, and then deeded it to Burr, who deeded it to Hass. Hass had no actual notice of the mortgage, but of course had constructive notice, by reason of the fact that the mortgage had been recorded. Afterwards Burr procured a quit claim deed from William Chapin and then quit claimed to Hass, who sought to defeat the mortgage. It was held that Hass was bound with notice of the record of the mortgage made by William F. Chapin, from whom, through Burr, he obtained his title, and that, therefore, he gained nothing by virtue of the quit claim deed. It will be seen, therefore, that the case has no application to the one at bar. It was not a question of an unrecorded mortgage placed on record after the execution and delivery of the quit claim deed, but of a mortgage actually recorded, of which Hass had constructive notice, by reasen of the record, before he took the quit claim deed.

I next refer to the case of *Snowden vs. Tyler*, 21 Neb., 199, where the rule for which I contend, with reference to a purchaser subsequent to the quit claim deed, is expressly affirmed. The Court says, in the following language, commencing near the top of page 215, in the opinion :

"It is claimed that the quit claim deed from Shirk to Poe conveyed no title, and that *bona fide* purchasers from Poe were not protected. The rule, no doubt, is that a person who purchases of another real estate, and receives a quit claim deed only therefor, is bound to inquire and ascertain at his peril what outstanding equities exist, if any, against the title. The reason is, his grantor will not warrant the title even as against himself, therefore, it is a cause of suspicion. We are not prepared to hold, however, that a quit claim deed, where the grantor has already conveyed, will not in any case convey title. It is not unreasonable to suppose that a quit claim deed occurs in many titles where there is no outstanding equity."

At page 16 of their brief, counsel criticises this opinion as "merely *obiter dicta* of Judge Maxwell." It is not subject to such criticism: first, because it is a most important part of the Court's argument; and secondly, because the rule is enforced by being made a part of the syllabus. In Nebraska, we look to the syllabus of the decision to determine the real decision of the Court, because by statute the Court is required to prepare the syllabus. It is by the syllabus that the Court considers itself bound, and the Court is thereby relieved from the burden of all the arguments which the Judge who writes the opinion, may present. In the syllabus, at page 199, the rule is stated thus:

"A quit claim deed of real estate, while affording cause for suspicion, may, where it appears in a chain of title on the proper records of the county, be sufficient to justify a *bona fide* purchaser for a valuable consideration in relying upon it as a valid conveyance. It is a *bona fide* purchaser for valuable consideration, and not a donee, who is protected."

It may be further said in support of this case, that it is subsequently cited by the Court with approval, at page 352, in the case of *Lavender vs. Holmes*, 23 Neb., 345, to which I next call attention, as supporting my position. At page 355 in the opinion, the Court says: "While we concede it to be the general rule, as stated by the authorities above cited, that a purchaser who acquires title by a quit claim deed is not a *bona fide* purchaser without notice of existing equities, yet we think it is sufficiently shown that there are exceptions to this rule, and that this case falls within the exception."

It thus appears, that, if the grantee in a quit claim deed be, in fact, a *bona fide* purchaser and without actual notice of outstanding equities, having made due inquiry, he will be protected.

See also *Alexander vs. Goodwin*, 20 Neb., 216.

Appellant's counsel cite the case of *Hoyt vs. Schuyler*, 19 Neb., 657, as supporting their contention. On the contrary, I claim that it supports my position. Immediately following the quotation copied in their brief at the top of page 16, the Court says:

"It is the purchaser in good faith for a valuable consideration and without notice of defects in the title, or such knowledge as if proper inquiry were made would lead to notice, that is protected; and the plaintiff fails to show that he is entitled to such protection, while it is pretty clear that he is not. A party who, claims title under a quit claim deed from one who had formerly conveyed his title to another, and the effect of which will be to deprive the first grantee of his title, must make a clear case of *bona fides* on his part before his title will be sustained."

The inference from this language clearly is, that the grantee in a quit claim deed will be protected, if he is able to make a good showing of *bona fides*; in other words, the quit claim deed is not conclusive against him.

In view of these decisions, and of the peculiar circumstances of this case, L. P. Dosh himself might have been protected. In the first place, it must be remembered that the deed from Bittenger to Probyne, either as originally made, or as afterwards changed, was not recorded for more than thirteen years after it purports to have been made. In the next place it appears that the land had remained wild, uncultivated and unoccupied during all these years. Such period of time is more than three years longer than is required by the Statute of Limitations of Nebraska, in order to acquire title by adverse possession. Then, again, in 1876, the land had been sold for taxes, and on November 21st, 1878, a tax deed had been issued to Ferdinand Furst (Record, page 45), which deed was recorded two days later. When L. P. Dosh procured his quit claim deed the tax deed was nearly five years old. Under these circumstances it was quite natural that the grantor would wish to give

only a quit claim deed, and just as natural for L. P. Dosh to take one, just as he subsequently did, from the holder of the tax title. Such proceedings, whereby a title is perfected by two quit claim deeds, one from the holder of the original title and the other from the holder of the tax title, are of very common occurrence; but the situation as to L. P. Dosh is not of importance in this suit. Having acquired both titles he sold, and by warranty deed conveyed the property to J. R. Dosh, who, in his turn and by warranty deed, conveyed the property to the appellee. All this occurred before the outstanding claim of title, by reason of the deed from Bittenger to Probyne, became of record.

Mr. Sherwood testifies (Record pp. 8 and 9) that he purchased the land without any notice of any outstanding title, and that he paid $1,800, in cash, for the tract in question, and another piece of land purchased at the same time. The Court below found and determined "that the complainant acted in good faith—in ignorance of the outstanding title not apparent of record—and paid full value for the land." (Record p. 61) and such is, no doubt, a true statement of his position. Under these circumstances, and under the rules and decisions of the Supreme Court of the State of Nebraska, and of other states above quoted, the decree appealed from should be affirmed, and Mr. Sherwood protected in his title to the land in controversy. Counsel for appellant, on page 18 of their brief seek to establish a point adverse to Sherwood, by the reason of the fact that the patent was not of record when he purchased. This is certainly not material; first, because the same fact is true as to the purchase by Moelle; and secondly, because both parties claim from the same source, and there is no dispute as to the patent title; and thirdly, because it was not necessary that the patent should be entered upon the deed records, in order that Sherwood and his attorney might have knowledge as to the identity of the patentee. Other records are kept in the offices of the county register, giving the names of the entrymen and patentees of the public lands, and, regardless of such records, there is always the general land office from

which such information can be obtained. It is certain that Mr. Sherwood had information upon this point, so that he knew he was getting the record title of the original patentee. The record is silent as to the source of such information, except that it was obtained from an abstract of title, which was not in evidence. The abstract, between pages 48 and 49 of the record, is of a later date. In any event, the source of his knowledge is immaterial, and the point made by counsel, without force.

In conclusion, upon the question of the validity of the Sherwood title, I cite the opinion of Mr. Justice Brewer, delivered in this case at the Circuit, and concurred in by District Judge Dundy, at pages 59, 60 and 61, of the record in this Court.

III.

Referring to subdivision IV., at page 22 of the brief of counsel for appellant, I have to say that I have already called attention to the statute there quoted, in my brief, filed in support of the motion to dismiss the appeal, wherein it is urged that, by reason of the statute in question, the value of the land itself, without the improvements, is the matter in controversy, and that hence this Court is without jurisdiction of the suit. I adhere to the position there taken, hence I deny that the decree appealed from deprived the appellant of the value of his improvements. Section 3, of chapter 63, entitled "Occupying Claimants," Comp. St. of Neb. for 1891, page 601, provides that "The Court rendering judgment or decree in any case provided for by this act against any occupant or claimant shall, at the request of such occupant or claimant, issue an order to the sheriff of the county wherein such real estate is situated, commanding him to summon three disinterested free-holders of such county, whose duty it shall be to appraise such real estate and the improvements aforesaid at their cash value as hereinafter provided."

From this it will be be seen that the question of improvements is not determined until after the judgment or decree upon the merits of the case is rendered, and that the proceedings to determine such

question of improvements must be put in motion "at the request of such occupant or claimant." That request has never been made in this case until now. Whenever a decision is reached by this Court, either by a dismissal of the appeal or upon the merits of the suit, the appellee may proceed to have his rights as an occupying claimant, if he has any, and whatever they may be, adjusted. It follows then, that the point urged is not well taken.

IV.

Having thus disposed of the questions raised by counsel for appellant in their brief, and having shown that, regardless of the status of the appellant, the appellee is entitled to have the decree rendered in his favor affirmed, unless the appeal be dismissed for want of jurisdiction, I now desire to call in question the right of the appellant to any relief in the case, even though as a general rule this Court should take the position that subsequent purchasers are affected by a quit claim deed in like manner with the grantee therein.

FIRST. THE APPELLANT WAS NOT HIMSELF A PURCHASER IN GOOD FAITH FOR FULL VALUE AND WITHOUT NOTICE OF THE DOSH CLAIM.

I cannot assert that he knew of the deed to Mr. Sherwood, although such deed was executed and delivered several months before Moelle obtained his deed from Probyne, for the reason that the Sherwood deed was not recorded until some time after; but it is very clear, from his own evidence and the circumstances of the case, that he knew of the Dosh title of record, and that he made the purchase from Probyne at an inadequate price, and took possession of the land as a speculation, and for the purpose of defeating the Dosh title. I call attention in this regard; first, to his evidence on page 31 of the record, from question No. 126 to question 141, on page 32, wherein "Exhibit E" (Record, page 40) is presented to him, and he admits that the words "you made it. Yours, Theo. J. Moelle, dep." (record, page 41), written in lead pencil, were in his handwriting. It will be observed that this exhibit is the quit claim deed

from Furst to L. P. Dosh, the record of which was certified by Mr. Moelle, as deputy clerk. The conclusion to be drawn from this is that he knew Dosh was trying to get both titles, and this lead pencil minute of his was a sort of congratulation that Dosh had succeeded.

I also call attention to the deed from L. P. Dosh, to J. R. Dosh, at page 44 of the record, and the endorsement of its filing, made by Theodore J. Moelle, as deputy recorder, shown at the bottom of page 45. These deeds and the endorsements thereon, taken in connection with the evidence of Mr. Moelle, commencing with the cross-examination at page 24 of the record, and thereafter, are quite conclusive of the proposition as to the character of his purchase and his knowledge of the outstanding Dosh title, and show that he is not entitled to any special consideration by this court. It would serve no good purpose to quote his evidence here, but its reading, I doubt not, will lead this court to the same conclusion that the court below reached and expressed in the following language at the conclusion of the judge's opinion, namely: "While on the other hand, the defendant paid much less than the value and probably bought with notice of complainant's rights." (Record, p. 61.)

SECOND. THE APPELLANT HAS NO TITLE TO THE LAND IN CONTROVERSY.

I now refer again to the matter of the deed from Bittenger to Probyne, mentioned above in my corrections of the statement of the case made by appellant's counsel. That deed, a copy of which is contained in the record at pages 49 and 50, did not convey the land in controversy. It was duly executed, witnessed, acknowledged and delivered on the 23rd day of June, 1870, in the condition in which it is found in the record. More than two years afterwards, in October, 1872, it was changed, so that "southwest quarter" was made to read "southeast quarter" and "section 32" was made to read "section 31." See evidence of Probyne, at pages 18 and 19 of the record, touching this subject. No new deed was made, but

Bittenger simply changed this one. He did not re-sign it, nor was it again witnessed, or again acknowledged, neither does it appear that his wife was present.

Certainly, under the circumstances, the deed, as changed, was not competent evidence of the conveyance of the title of the property in controversy from Bittinger to Probyne, and my objection to it, as shown in the record at the bottom of page 21 and the top of page 22, was well taken. Doubtless Probyne became the equitable owner of the land in controversy, by reason of his purchase from Bittenger, but he never received a conveyance of the land. The legal title remained in Bittenger and was never transferred from him, until he made his deed to L. P. Dosh. Our statute provides that "deeds of real estate * * * * must be signed by the grantor or grantors, being of lawful age, in the presence of at least one competent witness, who shall subscribe his or her name as a witness thereto, and be acknowledged or approved, and recorded as directed in this chapter." Sec. 1, Chap. 73, Comp. St. of Neb. for 1891, page 645. Under the provisions of this statute I submit that no deed of the land in controversy was executed and delivered from Bittenger to Probyne, and that, hence the appellant never obtained any title to the land, and that he is, therefore, in no position to controvert the title of appellee.

I respectfully submit, if the appeal be not dismissed, that the decree appealed from should be affirmed.

C. S. MONTGOMERY,
Of Counsel for Appellee.

148 U.S. 21

Office
DEC
JAMES H. Mc.

IN THE SUPREME COURT

OF THE

UNITED STATES.

THEODORE J. MOELLE,
Appellant.

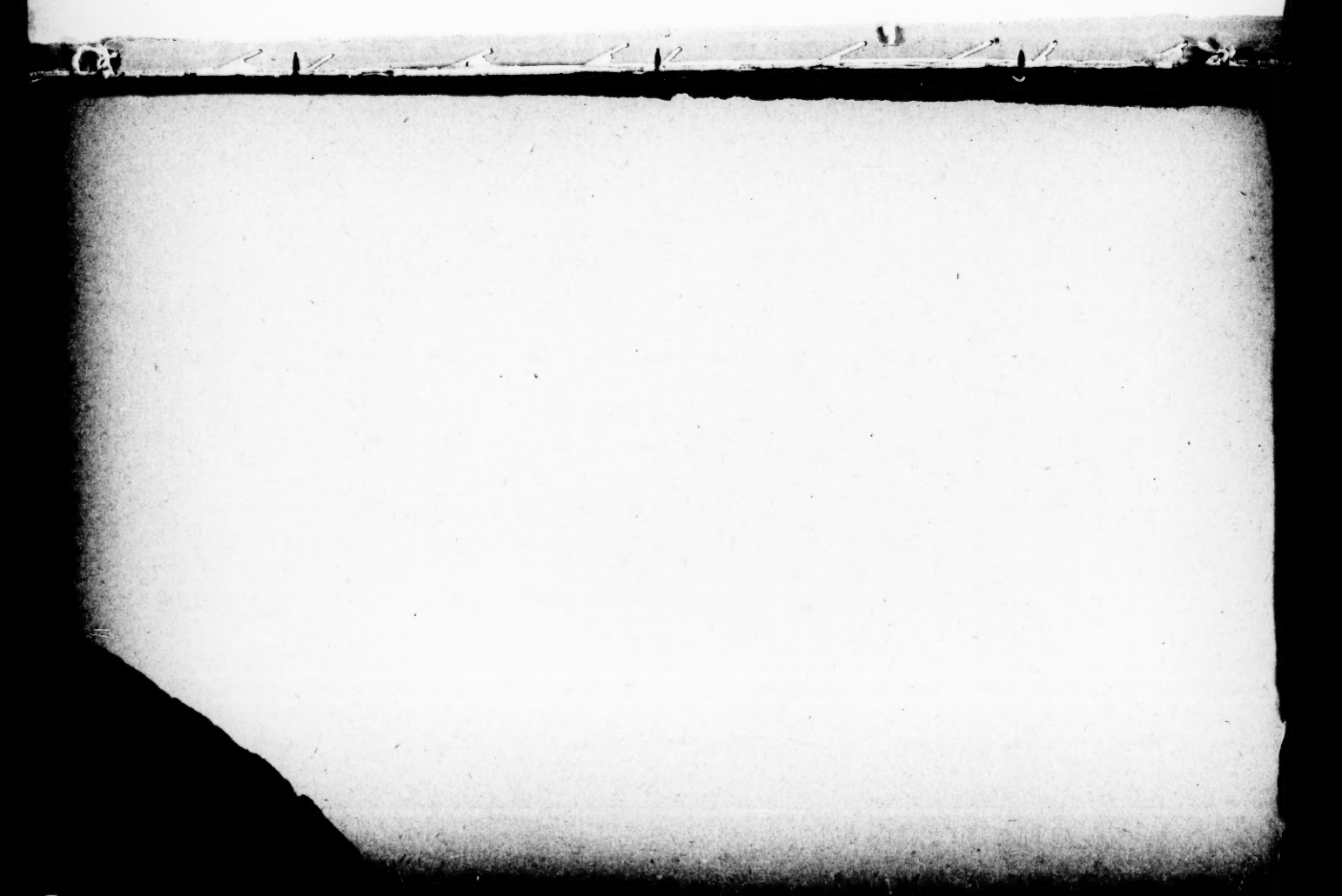
vs.

JAMES K. O. SHERWOOD,
Appellee.

OCTOBER TERM, 1892.—TERM NO. 103.

SUPPLEMENTAL BRIEF FOR APPELLANT.

By N. S. HARWOOD, AND
JOHN H. AMES,
Solicitors.



IN THE SUPREME COURT

OF THE

UNITED STATES.

THEODORE J. MOELLE,
Appellant.

vs.

JAMES K. O. SHERWOOD,
Appellee.

OCTOBER TERM, 1892.—TERM NO. 103.

SUPPLEMENTAL BRIEF FOR APPELLANT.

By N. S. HARWOOD, AND
JOHN H. AMES,
Solicitors.

In Bowman vs. Griffith, decided by the Supreme Court of Nebraska, on October 5th, 1892, since the printing of our former brief, and reported in Volume 53 of the North

Western Reporter at Page 140, it is said in the syllabus prepared by the court:

"One who accepts a quit-claim deed from his grantor is bound at his peril to ascertain what equities, if any, exist against his title."

In that case it appeared that the patentee of the land had intended to convey it, together with other property in a deed to one Moore, from which it was omitted by mistake. Subsequently he also conveyed it, also by mistake, to one Hyde; both deeds were made of record. Moore conveyed to Griffith, the defendant in the action, and Hyde to Stanhope by warranty deed, but apparently with notice or without consideration, because the opinion seems to accord to this deed no importance. Stanhope, by quit-claim, to F. M. Hall, Hall, by warranty, to Smith, and the latter, by warranty, to Bowman, the plaintiff in the action. The patentee Brown, after both his former conveyances, executed and delivered to Hyde another deed to correct the mistake in the previous one between the same parties, but this deed appears not to have been put of record, or its existence to have been known prior to the beginning of the suit, to any of the parties connected with the title or transaction, except Brown and Hyde, the grantor and grantee therein. The court held that Moore acquired the full equitable title, which was conveyed by him to Griffith, the defendant, and that the plaintiff, who claimed by mesne conveyances through the quit-claim deed to Hall, was not entitled to be treated as a *bona fide* purchaser, and that the title should therefore be quieted in the defendant Griffith. In the body of the opinion, the court say:

We now come to the question, is plaintaiff a *bona fide*

purchaser? His contention is that he purchased the property without notice of any claim of the defendant thereto, and that his equities are therefore superior, and should prevail against those of the latter. A *bona fide* purchaser is one who purchases for value without notice of the equities of third parties. Snowden vs. Tyler, 21 Neb., 199. 31 N. W. Rep., 661. The question of the equities of the respective parties was distinctly presented by the pleadings, and the plaintiff, while a witness in his own behalf, testified as follows: Q. You say you made no inquiry about the title before you bought it? A. No sir, none whatever. It does not appear from this testimony that he relied upon the title of Smith as grantor, or that he paid the consideration named without notice of the rights of the defendant. Nor does it appear that he was ever advised in whom the title of record rested. This showing falls far short of establishing his claim to the rights of a subsequent purchaser in good faith. The burden was upon him, and he was bound to prove both payment in ignorance of defendant's equities, and that he relied upon the title of his grantor.

This opinion seems to establish that the supreme court of Nebraska still adheres to the opinion with respect to grantees by quit-claim, for which we contend in our former brief, and have not adopted the doctrine that a chain may be stronger than its weakest link, or that a stream may rise higher than its source.

N. S. HARWOOD, and
JOHN H. AMES,
Solicitors for Appellants.

148 U. S. 31

RECORD, CASE NO. 15043.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1073.

THE UNITED STATES, APPELLANT,

vs.

THE CALIFORNIA AND OREGON LAND COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MAY 16, 1892.

RECORD, CASE NO. 15043.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1073.

THE UNITED STATES, APPELLANT,

vs.

THE CALIFORNIA AND OREGON LAND COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

October Term, 1891.

Be it remembered that, on the 7th day of January, 1892, there was duly filed in the United States Circuit Court of Appeals for the Ninth Circuit, a record, in words and figures as follows, to wit:

No. 22

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES, APPELLANT,

vs.

THE CALIFORNIA AND OREGON LAND COMPANY.

Appeal from the United States Circuit Court for the District of Oregon.

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UNITED STATES OF AMERICA, } ss.
District of Oregon. }

To the California & Oregon Land Company, defendant, and to Messrs. Dolph, Bellinger, Mallory & Simon, its attorneys, greeting:

Whereas, the United States, complainant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said District, this December 28, 1891.

MATHEW P. DEADY,
U. S. District Judge.

[Endorsed:]

UNITED STATES OF AMERICA, }
District of Oregon, } ss.
County of Multnomah. }

Due and legal service of the within citation is hereby admitted and accepted, at Portland, Oregon, this 28th day of December, 1891.

DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for California & Oregon Land Co., Defendant.

Filed Dec. 29, 1891.

UNITED STATES OF AMERICA, } ss.
District of Oregon. }

To the California & Oregon Land Company, defendant, and to Messrs. Dolph, Bellinger, Mallory & Simon, its attorneys, greeting:

Whereas, the United States, complainant, has lately appealed to the United States Circuit Court of Appeals for the

Ninth Circuit, from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear before said Circuit Court of Appeals, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this December 28, 1891.

(Signed) MATHEW P. DEADY,
U. S. District Judge.

[Endorsed:]

UNITED STATES OF AMERICA,
District of Oregon,
County of Multnomah. } ss.

Due and legal service of the within citation is hereby admitted and accepted, at Portland, Oregon, this 28th day of December, 1891.

DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for California & Oregon Land Co., Defendant.

Filed December 29, 1891.

H. LAMSON, Clerk.
R. B. Lamson, Deputy Clerk.

In the circuit court of the United States for the district of Oregon, April term, 1889.

Be it remembered, that on the 30th day of August, 1889, there was duly filed in the circuit court of the United States for the district of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

To the honorable the judges of the circuit court of the United States for the district of Oregon:

Comes now your orator, W. H. H. Miller, the Attorney-General of the United States of America, and in virtue of the provisions of an act of the Congress of the United States entitled "An act providing in certain cases for the forfeiture

of wagon-road grants in the State of Oregon," approved March 2, 1889, exhibits and presents this bill of complaint in behalf of the United States and against the Oregon Central Military Road Company, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and The California and Oregon Land Company.

I. And thereupon your orator shows to your honors that on the 2d day of July, A. D. 1864, the Congress of the United States passed and the President duly approved an act granting to the State of Oregon, to aid in the construction of a wagon road from Eugene City, by way of middle fork of Willamette River and the most feasable pass in Cascade range of mountains, near Diamond Peak to the eastern boundary of the State, the alternate sections of public land, designated by odd numbers to the extent of three sections on each side of said road; that said act provided that the lands granted should be exclusively applied to the construction of the road and to no other purpose; that they should be disposed of only as fast as the work upon the road progressed; that lands lying within the limit fixed by said act and theretofore reserved or appropriated should be reserved from the operation of said act, except so far as it might be necessary to locate the road over the same, in which case a right of way to the width of one hundred feet was granted; that the land granted thereby to the State of Oregon should be disposed of by the legislature thereof for the uses and purposes therein set forth and for no other purposes; that the road should be and remain a public highway for the use of the United States, free from toll or other charges, upon the transportation of any property, troops, or mails of the United States, and also that the road should be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road and in such other special manner as the State of Oregon might prescribe. That said act further provided that the lands thereby granted to the State of Oregon should be disposed of only in the following man-

ner, that is to say: That a quantity of land not exceeding thirty sections might be sold, and when the Governor of the State should certify to the Secretary of the Interior that ten coterminous miles of said road were completed, then another quantity of land granted by the act, not exceeding thirty sections, might be sold, and so on from time to time until said road should be completed, and if the road was not completed within five years, no further sales should be made and the lands remaining unsold should revert to the United States.

II. And your orator further shows to your honors that on the 24th day of October, A. D. 1864, the legislative assembly of the State of Oregon passed, and the governor approved, an act entitled "An Act donating certain lands to Oregon Central Military Road Company," which act, after referring to the act of Congress aforesaid, granted to Oregon Central Military Road Company all lands, rights of way, rights, privileges, and immunities granted or pledged to the State of Oregon, by said act of Congress aforesaid, for the purpose of aiding said Oregon Central Military Road Company in constructing the road mentioned and described in said act of Congress aforesaid, and upon the conditions and immunities therein prescribed; and, further, that the said act of the said legislative assembly granted and pledged to the said Oregon Central Military Road Company all moneys, lands, rights, privileges, and immunities which might thereafter be granted to the State of Oregon to aid in the construction of said road, for the purposes and upon the conditions mentioned in said act of Congress, or which might be mentioned in any further grant of money or land to aid in constructing said road; that on the 26th day of December, 1866, the Congress of the United States passed and the President approved an act amending the act of Congress aforesaid, and granting to the State, for the purpose set forth in said act aforesaid, such odd sections or parts of odd sections, not reserved or otherwise legally appropriated, within six miles on each side of said road to be selected by the surveyor-general of the State of Oregon, as should be sufficient to supply any deficiency in the quantity of said grant as prescribed in said act of Congress aforesaid, occasioned by any

lands sold or reserved or to which the rights of pre-emption or homestead had attached, or which for any reason might not be subject to the said grant within the limits designated in said act of Congress aforesaid.

III. And your orator further shows to your honors that the State of Oregon never at any time passed any laws whatsoever for the special purpose of carrying the act of Congress aforesaid into effect, but long before the passage and approval of said act of Congress and on the 14th day of October, A. D. 1862, the legislative assembly of the State of Oregon passed an act entitled "An act providing for private incorporations and the appropriation of private property therefor," which was approved by the governor of Oregon on said day last aforesaid, which act provided, among other things, that any road, other than a railway, constructed by a corporation formed under the said law, should be cleared of standing timber for thirty feet in width, that said road should have a track in the center not less than sixteen feet in width finished and kept in good traveling condition except when the cut of said road is six feet or more deep on either side, in which case said road need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of said narrow track. And said act of the legislative assembly of Oregon last aforesaid also provided that all streams or other waters upon the line of such roads should be safely and securely bridged, except where the county court of the county wherein the line of such road may cross such streams, or other water, or if such stream or other water form the boundary between two counties, then the county court of either of said counties might authorize the corporation to place a ferry-boat upon such stream or other water, to be kept and run for such toll as the county court might prescribe, and in the manner required of ferries established under the general statutes in relation to ferries; or except where such county court might authorize such corporation to connect their road with a ferry, at the date of said act or thereafter established over such stream or other water under the general statutes in relation to ferries, and that said provisions of said act of the legislative assembly of the State of Oregon last aforesaid

have been in force at all times since the 14th day of October, 1862, and still remain in force.

IV. And your orator further shows to your honors that the Oregon Central Military Road Company is a private corporation purporting to have been incorporated on the 15th day of April, A. D. 1864, under and by virtue of the general laws of the State of Oregon providing for private incorporations and the appropriation of private property therefor. That the enterprise and business in which the said corporation proposed to engage was the location, construction, and operation of a road suitable for the use of pack trains, wagons, and other conveyances from Eugene City, Oregon, in a southeasterly direction to the southeastern corner of the State of Oregon by way of the middle fork of the Willamette River.

V. And your orator further shows to your honors that on the 27th day of July, 1866, the officers, stockholders, and agents of the Oregon Central Military Road Company and other persons, acting in their interest and in the interest of said company, falsely and fraudulently represented to Addison C. Gibbs, then the governor of Oregon, that said road had been constructed for fifty miles from Eugene City, eastward, as by law required; they, the said officers, stockholders, agents, and representatives and other persons aforesaid, then and there well knowing that said representations were false and that the said road had not been constructed in any respect according to law or at all; that they and each of them made the said false and fraudulent representation for the sole and only purpose of fraudulently procuring from the said Addison C. Gibbs, as governor of the State of Oregon, a certificate declaring that the said road had been constructed in accordance with the act of Congress aforesaid, approved July 2d, 1864, and of the act of the legislative assembly aforesaid, approved October 24, 1864.

That the said Addison C. Gibbs, then governor of Oregon, in consequence of said false and fraudulent representations made as aforesaid by the persons aforesaid, made and issued the following certificate:

STATE OF OREGON, EXECUTIVE DEPARTMENT,
SALEM, July 27, 1866.

SIR: I hereby certify that in accordance with an act of Congress approved July 2d, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the southern or eastern boundary of said State," and in accordance with the act of the legislative assembly of the State of Oregon, approved October 24th, 1864, entitled "An act donating certain lands to the Oregon Central Military Road Company," I have passed over and carefully examined the first 50 miles of the Oregon Central Military Road Company, beginning at Eugene City and extending eastward and towards the southern or eastern boundary of the State of Oregon.

And I further certify that the first continuous 50 miles of said road, beginning at Eugene City, are completed in accordance with the requirements of said act of Congress and the laws of Oregon.

In witness whereof I have hereunto set my hand and caused the said seal of the State of Oregon to be affixed.

ADDISON C. GIBBS,
Governor of Oregon.

By the governor:
[SEAL.] SAMUEL E. MAY,
Secretary of State.

The SECRETARY OF THE INTERIOR.

VI. And your orator further shows to your honors that it was not and is not true that the Oregon Central Military Road Company had at any time whatsoever constructed, or caused to be constructed, the fifty miles of road referred to in the said certificate, and that in order to procure the said certificate and to use the same to secure the possession and control of the lands within the limits of the grant provided for in the act of Congress first hereinbefore pleaded, the said company, by its officers, agents, and representatives, fraudulently pointed out to the said Addison C. Gibbs, governor aforesaid, a county road, to which said company never at any time had any legal right whatsoever, and led the said governor to believe that said road was owned and had been

constructed by said company under and by virtue of the acts of Congress and of the legislative assembly of Oregon aforesaid, and the said certificate was fraudulently and inequitably obtained.

VII. And your orator further shows to your honors that on the 26th day of November, A.D. 1867, the officers, stockholders and agents of the Oregon Central Military Road Company, and other persons acting in the interests thereof, falsely and fraudulently represented to George L. Woods, then the governor of Oregon, that forty-two and one-half additional miles of said road had been constructed as by law required; they, the said officers, stockholders, agents, and representatives, and other persons aforesaid, then and there well knowing that said representations were false, and that the said road had not been constructed in any respect according to law or at all; that they and each of them made the said false and fraudulent representation for the sole and only purpose of fraudulently procuring from the said George L. Woods, as governor of the State of Oregon, a certificate declaring that the said road had been constructed in accordance with the act of Congress aforesaid, approved July 24, 1864, and the act of the legislative assembly aforesaid, approved October 24th, 1864.

That the said George L. Woods, then governor of Oregon, in consequence of said false and fraudulent representations made as aforesaid by the persons aforesaid, made and issued the following certificate:

STATE OF OREGON, EXECUTIVE OFFICE,
SALEM, November 26, 1867.

To all to whom these presents shall come, greeting:

This certifies that the section of the Central Military Road extending from the point to which it has already been approved to Crescent Lake, in the valley of the Deschutes, being 42½ miles, more or less, having been carefully inspected and found to be well and faithfully built and fully up to the requirements of the law, therefore the same is approved and received.

In witness whereof I have hereunto signed my name, and

caused the seal of the State of Oregon to be affixed, the day and the year first above written.

GEO. L. WOODS.

Attest.
[SEAL.] SAMUEL E. MAY,
Secretary of State.

VIII. And your orator further shows to your honors that it was not and is not true that the Oregon Central Military Road Company had at any time whatsoever constructed or caused to be constructed said forty-two and one-half miles of road, and this the said George L. Woods, governor aforesaid, then and there well knew, and that it was not and is not true that a careful or any inspection of any road constructed or owned by the Oregon Central Military Road Company had been made by the authority of the said governor.

IX. And your orator further shows to your honors that said certificate was procured by the said Oregon Central Military Road Company by and through the false and fraudulent representations aforesaid by the officers, stockholders, agents, and persons aforesaid, in order to enable it falsely and fraudulently to obtain possession and control of the lands lying within the limits of the grant of land provided for in the act of Congress aforesaid, and coterminous with said forty-two and one-half miles, and that the acceptance of said pretended road by the governor aforesaid was a fraud upon the United States of America.

X. And your orator further shows to your honors that on the 12th day of January, A.D. 1870, the officers, stockholders and agents of the Oregon Central Military Road Company and other persons, acting in their interest and in the interest of said company, falsely and fraudulently represented to George L. Woods, then the governor of Oregon, that said road had been constructed as by law required, and presented a map falsely showing the same and the route thereof, they, the said officers, stockholders, agents and representatives and other persons aforesaid, then and there well knowing that said representations were false and that the said road had not been constructed in any respect ac-

cording to law or at all; that they and each of them made the said false and fraudulent representation for the sole and only purpose of fraudulently procuring from the said George L. Woods, as governor of the State of Oregon, a certificate declaring that the said road had been constructed in accordance with the act of Congress aforesaid, approved July 2d, 1864, and of the act of the legislative assembly aforesaid, approved October 24th, A.D. 1864.

That the said George L. Woods, then governor of Oregon, in consequence of said false and fraudulent representations made as aforesaid by the person aforesaid, made and issued the following certificate:

STATE OF OREGON:

I, George L. Woods, governor of the State of Oregon, do hereby certify that this plat or map of the Oregon central military road has been duly filed in my office by the said Oregon Central Military Road Company, and shows that portion of the said road commencing at Eugene City, Oregon, and ending at the eastern boundary of the State, which has been completed as required by the act of Congress approved July 2, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and the act of the legislative assembly of the State of Oregon, approved October 24th, 1864, entitled "An act donating certain lands to the Oregon Central Military Road Company," granting lands to said company.

In testimony whereof I have hereunto set my hand and caused the great seal of the State to be affixed.

Done at Salem on this the 12th day of January, A.D. 1870.

GEO. L. WOODS,
Governor.

By the governor:
[SEAL.]

SAMUEL E. MAY,
Secretary of State.

XI. And your orator further shows to your honors that it was not and is not true that the Oregon Central Military Road Company had at any time whatsoever constructed, or caused to be constructed, a road upon any line of route

located or surveyed by said company or by any other corporation, person, or persons, anywhere within the limits of the grant of land provided for in the act of Congress aforesaid, or at all, and this the said George L. Woods, governor aforesaid, then and there well knew, and that it was not and is not true that the said governor made or caused to be made a careful, or any, examination of any road constructed or owned by the Oregon Central Military Road Company.

XII. And your orator further shows to your honors that all of said certificates were procured by the said Oregon Central Military Road Company by and through the false and fraudulent representations aforesaid by the officers, stockholders, agents, and persons aforesaid in order to enable it falsely and fraudulently to obtain possession and control of the lands lying within the limits of the grant of land provided for in the act of Congress aforesaid, and that the acceptance of said pretended road by the governor and the acting governor aforesaid was a fraud upon the United States of America.

XIII. And your orator further shows to your honors that the said road never was built, graded, bridged, cleared, or constructed, either in whole or in part, so as to be a public highway, or so as to permit of the transportation of any property, troops, or mails of the United States over the same, and was not and never has been maintained as a public highway by either or any of the defendants herein, or any person or persons claiming any interest in the lands embraced within the limits provided for by the said act of Congress.

XIV. And your orator further shows to your honors that notwithstanding the provisions of the act of Congress declaring that the lands granted thereby should be exclusively applied to the construction of the road, and to no other purpose, neither the said lands nor the proceeds thereof have ever been exclusively, or at all, applied to the construction of the road, or any part thereof, or to the construction of any bridges thereon, or the establishment of any ferries on any streams along the line of the road or any part thereof.

XV. And your orator further shows to your honors that the lands granted by the said act of Congress were not and have not been disposed of by the State of Oregon, or by the legislative assembly thereof, for the purposes expressed in said act of Congress or any thereof.

XVI. And your orator further shows to your honors that on the eighteenth day of June, A. D. 1874, the Congress of the United States passed and the President duly approved an act which, after reciting that certain lands had theretofore by acts of Congress been granted to the State of Oregon, to aid in the construction of certain military wagon roads in said State, and that there was no existing law providing for the issuing of formal patents for said lands, provided as follows:

"That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall, by public act, have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon the payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled."

XVII. And your orator further shows to your honors that on the 13th day of November, of 1867, the Secretary of the Interior Department and the Commissioner of the General Land Office of the United States, being deceived, misled, and imposed upon by the false and fraudulent certificates hereinabove set forth, executed and delivered to the State of Oregon, for the benefit of said road, a certified list of land which the said defendants claim has the force and effect of a patent duly issued by the United States,

which list so certified contained a description of $19,153\frac{23}{100}$ acres of land intended to be granted by said acts of Congress.

That on the 21st day of April, 1871, the Secretary of the Interior Department and the Commissioner of the General Land Office of the United States, being deceived, misled, and imposed upon by the false and fraudulent certificates hereinabove set forth, executed and delivered to the State of Oregon, for the benefit of said road, a certified list of land which the said defendants claim has the force and effect of a patent duly issued by the United States, which list so certified contained a description of $167,633\frac{57}{100}$ acres of land intended to be granted by said acts of Congress.

That on the 8th day of December, 1871, the Secretary of the Interior Department and the Commissioner of the General Land Office of the United States, being deceived, misled, and imposed upon by the false and fraudulent certificates hereinabve set forth, executed and delivered to the State of Oregon, for the benefit of said road, a certified list of land which the said defendants claim has the force and effect of a patent duly issued by the United States, which list so certified contained a description of $113,504\frac{91}{100}$ acres of land intended to be granted by said acts of Congress.

That on the 2d day of April, 1873, the Secretary of the Interior Department and the Commissioner of the General Land Office of the United States, being deceived, misled, and imposed upon by the false and fraudulent certificates hereinabove set forth, executed and delivered to the State of Oregon, for the benefit of said road, a certified list of land which the said defendants claim has the force and effect of a patent duly issued by the United States, which list so certified contained a description of $23,458\frac{48}{100}$ acres of land intended to be granted by the said acts of Congress.

That on the 21st day of April, 1871, the Secretary of the Interior Department and the Commissioner of the General Land Office of the United States, being deceived, misled, and imposed upon by the false and fraudulent certificates hereinabove set forth, executed and delivered to the State of Oregon, for the benefit of said road, a certified list of

pany, a certified copy of which is hereunto attached, marked Exhibit N, and made part hereof; which said deed was filed for record in the office of the county clerk of Grant County, Oregon, on the first day of March, A.D. 1878, and was recorded on pages 103 to 108, in Volume D of the Record of Deeds in and for said Grant County.

That each and every of said deeds conveyed the lands in bulk, and purported to grant to the respective grantees all the lands lying and being in the State of Oregon granted or intended to be granted to the State of Oregon by the act of Congress first hereinabove pleaded and granted or intended to be granted by the State of Oregon to the Oregon Central Military Road Company by the act of the legislative assembly first hereinabove pleaded; and that the substantive parts of both of said acts are recited in all of the said deeds, and expressly made parts of each thereof.

XIX. And your orator further shows to your honors that the California and Oregon Land Company is a private corporation, purporting to have been incorporated under the general laws of the State of California, on the 9th day of January, 1877. That the enterprise and business in which the said corporation proposed to engage was, among other things, that of buying and selling lands in the State of Oregon. That the incorporators were N. D. Rideout, W. H. Parks, Wm. C. Belcher, R. F. Parks, M. P. Jones, E. B. Pond, G. W. Colby, J. M. Peck, James Carolan, Nicholas Lunning, B. F. Baker, Isaac Lohman, Isaac Allen, Edgar Mills, Orrin Gowell, Robert Hamilton, and John Boggs; that the said corporation is still in being, and that E. B. Pond is the president and Abraham Halsey the secretary thereof.

XX. And your orator further shows to your honors, that the maps or plats referred to in the certificates hereinabove set forth, showed the line of the pretended road to be four hundred and twenty miles, which would make the grant of lands covered by the act of Congress first aforesaid embrace in the aggregate about seven hundred and twenty thousand acres, of which four hundred and two thousand two hundred and forty and $\frac{67}{100}$ acres have been in

effect patented to the said road company, and for the remaining three hundred and seventeen thousand seven hundred and fifty-nine and $\frac{33}{100}$ acres the said company inequitably claims the right to have a patent issue therefor.

XXI. And your orator further shows to your honors that each and every of the defendants, to wit: The Oregon Central Military Road Company, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, the California and Oregon Land Company, at the time of the execution and delivery of the deeds aforesaid, and at the time of the accruing of their or any of their interests in said lands aforesaid, had full knowledge that the road provided for by the act of Congress first aforesaid had not at any time been constructed and maintained as required by said act of Congress and by the laws of the State of Oregon, so as to be in any sense whatsoever a public highway, or so that it could be used by the United States, or by any of the citizens or residents thereof as a public highway, or so that the United States could transport its property, troops, or mails over the same, and also had full knowledge that no grades had been established or constructed upon said road or any part thereof, that no clearing had been done on any part thereof, no bridges built over any streams on the line thereof, no cuts made, and no turnouts constructed anywhere on said line of road by the Oregon Central Military Road Company, or by any of the grantors or grantees mentioned and described in any of said deeds aforesaid, and that no ferries had been established or maintained over any streams on the line of said road, and had full knowledge that said road was not begun nor completed within five years from the date of the passage of the act of Congress first aforesaid, and that it had never been begun, constructed, or maintained, and that each and every of said defendants well knew that the statements made in the certificates of the governors and acting governor of Oregon hereinabove set forth were false; that the governors and acting governor did not at any time whatsoever examine the road referred to

in the said certificates, and that the said certificates had been procured by false and fraudulent representations as aforesaid, and that the patents aforesaid were procured to be issued upon said false and fraudulently-procured certificates.

Prayer.

I. Your orator therefore prays that all the lands granted to the State of Oregon by the act of Congress of date July 2d, A. D. 1864, be decreed forfeit to the United States and restored to the public domain.

II. That the patents and lists described in this bill of complaint be declared fraudulent and void.

III. That the certificates described in this bill of complaint be declared fraudulent and void.

IV. That the deeds described in this bill of complaint be declared fraudulent and void.

V. That the United States have such other and further relief as to equity seemeth meet.

VI. That the United States writ of subpœna may issue requiring the defendants to appear in this honorable court under certain pains and penalties therein prescribed and answer the foregoing bill of complaint.

VII. And that the defendants pay the costs, expenses, and disbursements of this suit.

O. W. CHAPMAN,
Acting Attorney General.
LEWIS L. MCARTHUR,
U. S. Attorney for Oregon.
WILLIAM CASEY JOHNSON,
Special Assistant U. S. Attorney.

Endorsed: Filed August 30, 1889.
R. H. Lamson, Clerk.

EXHIBIT "A."

List No. 1 of lands "in place" granted to the State of Oregon by the act of Congress approved the 2nd of July, 1864, "to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

[List No. 1 of lands in places granted to the State of Oregon by the act of Congress approved July 2nd, 1864, "to aid in the construction of a military road from Eugene City to the eastern boundary of said State."]

ROSEBURG DISTRICT, SOUTHEAST.—THREE MILES LIMITS.

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
All of	5	19	1	614 72	
All of	7	19	1	641 18	
All of	19	19	1	589 60	
All of	25	19	1	640 00	
All of	27	19	1	640 00	
All of	29	19	1	665 19	
All of	33	19	1	592 42	
All of	35	19	1	640 00	
All of	1	20	1	625 18	
All of	3	20	1	567 18	
All of	11	20	1	640 00	
All of	7	20	2	612 83	
All of	17	20	2	626 24	
All of	35	20	2	596 79	
All of	1	21	2	607 15	
All of	11	21	2	629 20	
All of	13	21	2	595 39	
NE. frl. $\frac{1}{4}$	3	21	3	160 36	
NE. frl. $\frac{1}{4}$ of NW. $\frac{1}{4}$ & S. $\frac{1}{2}$ of NW. $\frac{1}{4}$	3	21	3	120 48	
S. $\frac{1}{2}$ of sec.	3	21	3	320 00	
All of	5	21	3	639 56	
All of	7	21	3	634 62	
N. $\frac{1}{2}$ of sec. SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$	9	21	3	560 00	
All of	15	21	3	640 10	
W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and lots 1, 2, 3, 4, 5, 6, 7 & 8	17	21	3	357 60	
Lots No. 1 & 2	21	21	3	36 66	
Lots No. 1 & 2	27	21	3	80 53	

SOUTHWEST.

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
SE. $\frac{1}{4}$	1	19	1	160 00	
SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ & S. $\frac{1}{2}$ of NW. $\frac{1}{4}$	1	19	1	120 00	
Lots No. 1, 2, 3, 4, 5, 6 & 7	1	19	1	357 17	
N. frl. $\frac{1}{4}$ of NE. $\frac{1}{4}$	3	19	1	82 00	
N. frl. $\frac{1}{4}$ of NW. $\frac{1}{4}$	3	19	1	81 20	
SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$	3	19	1	40 00	
S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ & SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$	3	19	1	120 00	
NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and lots 1, 3, 4, 5, 6, 7 & 8	3	19	1	280 73	
E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ & lots 1, 2, 3 & 4	11	19	1	197 20	
N. $\frac{1}{2}$ of sec.	13	19	1	320 00	
Lots 3, 4, 5, 6, 7 & 8	13	19	1	196 50	
SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$	16	19	1	40 00	
Lots 1, 2, 5, 6, 7, 9, 11 & 12	16	19	1	198 70	

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
Lots No. 3, 4 & 5.	17	19	1	46.45	
W. frl. ½ of sec.....	19	19	1	322.28	
N. ½ of NE. ¼...	19	19	1	80.00	
S. ½ of SE. ¼.	19	19	1	80.00	
Lot No. 1	21	19	1	11.14	
Lots No. 1, 2 & 3 and SW. ¼	27	19	1	240.12	
S. ½ of sec.	29	19	1	320.00	
Lots No. 2, 3, 4, 5 & 6.....	29	19	1	150.96	
N. ½ of NE. ¼.....	31	19	1	80.00	
N. ½ of sec..	33	19	1	320.00	
N. ½ of SE. ¼.	33	19	1	80.00	
N. ½ of SW. ¼.....	33	19	1	80.00	
Lots No. 1, 2, 3 & 4	1	19	2	86.28	
Lot 3	3	19	2	8.00	
Lot 2	5	19	2	12.74	
Lots 2 & 3.....	9	19	2	21.70	
All of..... .	11	19	2	640.00	
W. ½ of sec.....	13	19	2	320.00	
W. ½ of SE. ¼	13	19	2	80.00	
Lots No. 1, 2, 3, 4 & 5.....	13	19	2	78.48	
N. ½ of NE. ¼	23	19	2	80.00	
SE. ¼ of NE. ¼	23	19 S	2W	40.00	
NE. ¼ of NW. ¼.....	23	19	2	40.00	
SE. ¼ of NE. ¼.....	25	19	2	40.00	
Total	.....	.....	.....	19,153.73	

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
November 13th, 1867.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the foregoing on pages one to three inclusive, is a correct and true list of the tracts of land within the three miles limits, granted to the State of Oregon, by the act of Congress, approved the 2d of July, 1864, entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State," being the vacant and unappropriated lands in the alternate sections designated by odd numbers for three sections in width on each side of said road, and making the first thirty sections which the said State is authorized by the 4th section of the act to sell in advance of the building of any portion of the road.

And I respectfully recommend that the same be approved subject to any valid interfering rights which may have existed at the date of selection.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the City of Washington on the day and year first herein above written.

[SEAL.] JOS. S. WILSON,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., November 13th, 1867.

Approved, subject to the conditions and rights above mentioned.

O. H. BROWNING,
Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Aug. 8th, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of list No. 1, of lands certified to the State of Oregon November 13, 1867, for the Oregon Central Military Wagon Road Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of the General Land Office.

EXHIBIT "B."

List No. 2 of lands "in place" granted to the State of Oregon by the acts of Congress approved the 24 of July, 1864, and the 3d of March, 1869, "to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

SOUTH OF BASE LINE AND EAST OF WILLAMETTE MERIDIAN, OREGON.
OREGON CENTRAL MILITARY WAGON ROAD.—LIST.

[Three-mile limits. Roseburg district.]

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
All of sec.	23	29	8	640.00	
All of	25	29	8	640.00	
All of	27	29	8	640.00	
All of	35	29	8	640.00	
W. ½ of sec.	1	30	8	320.36	
All of	3	30	8	640.28	
All of	11	30	8	640.00	
W. ½ of sec.	13	30	8	313.95	
Fract'l sec.	15	30	8	274.13	
All.	1	35	9	648.00	
All.	3	35	9	647.46	
S. ½ of sec. & NE. ¼.	5	35	9	481.20	
All of	9	35	9	640.00	
All of	11	35	9	640.00	
All of	13	35	9	640.00	
All of	23	35	9	640.00	
All of	25	35	9	640.00	
All of	35	35	9	640.00	
SW. ¼.	5	35	10	160.00	
All of	7	35	10	644.32	
SW. ¼.	15	35	10	160.00	
All of	17	35	10	640.00	
All of	19	35	10	643.89	
All of	21	35	10	640.00	
W. ½ of sec. & SE. ¼.	23	35	10	480.00	
All of	25	35	10	640.00	
All of	27	35	10	640.00	
All of	29	35	10	640.00	
All of	31	35	10	642.22	
All of	33	35	10	640.00	
All of	35	35	10	640.00	
All of	1	36	10	640.35	
All of	3	36	10	640.00	
All of	5	36	10	638.46	
All of	7	36	10	640.42	
All of	9	36	10	640.00	
All of	11	36	10	640.	
All of	13	36	10	640.00	
All of	15	36	10	640.00	
N. ½ of sec.	17	36	10	320.00	
All of	23	36	10	640.00	
All of	27	35	11	640.00	
All of	29	35	11	640.00	

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
All of	31	35	11	636.24	
All of	33	35	11	640.00	
All of	35	35	11	640.00	
All of	25	35	11	640.00	
All of	1	36	11	641.46	
All of	3	36	11	646.74	
All of	5	36	11	641.26	
All of	7	36	11	632.48	
All of	9	36	11	640.00	
All of	11	36	11	640.00	
All of	13	36	11	640.00	
All of	15	36	11	640.00	
All of	17	36	11	640.00	
All of	19	36	11	642.26	
All of	21	36	11	640.00	
All of	23	36	11	640.00	
S. ½ of sec.	25	35	12	320.00	
All of	27	35	12	640.00	
All of	29	35	12	640.00	
All of	31	35	12	640.73	
All of	33	35	12	640.00	
All of	35	35	12	640.00	
All of	1	36	12	640.20	
All of	3	36	12	644.80	
All of	5	36	12	644.16	
All of	7	36	12	641.88	
All of	9	36	12	640.00	
All of	11	36	12	640.00	
All of	13	36	12	640.00	
All of	15	36	12	640.00	
All of	17	36	12	640.00	
All of	19	36	12	654.02	
All of	21	36	12	640.00	
All of	23	36	12	640.00	
All of	25	36	12	640.00	
All of	31	35	13	639.44	
S. ½ of sec., S. ½ of NE. ¼, and S. ½ of NW. ¼	33	35	13	480.00	
S. ½ of sec., S. ½ of NE. ¼, and S. ½ of NW	35	35	13	480.00	
All of	1	36	13	639.23	
All of	3	36	13	633.84	
All of	7	36	13	638.46	
All of	11	36	13	640.00	
All of	13	36	13	640.00	
All of	15	36	13	640.00	
All of	17	36	13	640.00	
All of	19	36	13	641.22	
All of	21	36	13	640.00	
All of	23	36	13	640.00	
All of	25	36	13	640.00	
All of	27	36	13	640.00	
All of	29	36	13	640.00	
N. ½ of NE. ¼ & N. ½ of NW. ¼	33	36	13	160.00	
N. ½ of NE. ¼ & N. ½ of NW.	35	36	13	160.00	
S. ½ of sec., S. ½ of NE. ¼, and S. ½ of NW. ¼	31	35	14	475.47	
S. ½ of sec.	33	35	14	320.00	
SW. ¼	1	36	14	160.00	

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
All of	3	36	14	632.00	
All of	5	36	14	632.80	
All of	7	36	14	633.38	
All of	9	36	14	640.00	
All of	11	36	14	640.00	
All of	13	36	14	640.00	
All of	15	36	14	640.00	
All of	17	36	14	640.00	
All of	19	36	14	640.12	
All of	21	36	14	640.00	
All of	23	36	14	640.00	
All of	25	36	14	640.00	
All of	27	36	14	640.00	
All of	29	36	14	640.00	
N. ½ of NE. ¼ & N. ½ of NW. ¼	31	36	14	158.38	
N. ½ of sec., SE. ¼ & N. ½ of SW. ¼	33	36	14	560.00	
All of	35	36	14	640.00	
All of	1	37	14	642.82	
E. ½ of sec. & NW. ¼	3	37	14	486.78	
E. ½ of sec. & NW. ¼	11	37	14	480.00	
E. ½ of sec	13	37	14	320.00	
W. ½ of sec	7	36	15	318.52	
W. ½ of sec	17	36	15	320.00	
All of	19	36	15	640.58	
W. ½ of sec. & SE. ¼	21	36	15	480.00	
W. ½ of sec. & SE. ¼	27	36	15	440.00	
All of	29	36	15	640.00	
All of	31	36	15	640.00	
All of	33	36	15	640.00	
W. ½ of sec. & SE. ¼	35	36	15	480.00	
W. ½ of sec. & SE. ¼	1	37	15	477.84	
All of	5	37	15	641.76	
All of	7	37	15	642.86	
All of	9	37	15	640.00	
All of	11	37	15	640.00	
All of	13	37	15	640.00	
All of	15	37	15	640.00	
All of	17	37	15	640.00	
N. ½ of sec	19	37	15	320.00	
All of	21	37	15	640.00	
All of	23	37	15	640.00	
All of	25	37	15	640.00	
All of	27	37	15	640.00	
N. ½ of sec	29	37	15	320.00	
N. ½ of sec. & SE. ¼	33	37	15	480.00	
All of	35	37	15	640.00	
All of	1	39	18	639.84	
All of	13	39	18	640.00	
All of	23	38	19	640.00	
All of	25	38	19	640.00	
All of	27	38	19	640.00	
E. ½ of sec. and SW. ¼	29	38	19	480.00	
All of	31	38	19	637.70	
All of	33	38	19	640.00	
All of	35	38	19	640.00	
All of	1	39	19	639 20	
All of	3	39	19	634.92	
All of	5	39	19	634.08	

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
All of	7	39	19	633.36	
All of	9	39	19	640.00	
All of	11	39	19	640.00	
All of	13	39	19	640.00	
All of	15	39	19	640.00	
All of	17	39	19	640.00	
All of	19	39	19	632.96	
All of	21	39	19	640.00	
All of	23	39	19	640.00	
N. ½ of NE. ¼ & N. ½ of NW. ¼	29	39	19	160.00	
SE. ¼	7	38	20	160.00	
All of	9	38	20	640.00	
W. ½ of sec. & SE. ¼	11	38	20	480.00	
All of	13	38	20	640.00	
All of	15	38	20	640.00	
All of	17	38	20	640.00	
All of	19	38	20	635.66	
All of	21	38	20	640.00	
All of	23	38	20	640.00	
All of	25	38	20	640.00	
All of	27	38	20	640.00	
All of	29	38	20	640.00	
All of	31	38	20	630.36	
All of	33	38	20	640.00	
All of	35	38	20	640.00	
All of	1	39	20	639.72	
All of	3	39	20	639.40	
All of	5	39	20	641.36	
All of	7	39	20	636.12	
N. ½ of sec.	9	39	20	320.00	
All of	11	39	20	640.00	
All of	13	39	20	640.00	
NW. ¼	17	39	20	160.00	
All of	25	38	21	640.00	
All of	27	38	21	640.00	
All of	31	38	21	640.80	
All of	33	38	21	640.00	
All of	35	38	21	640.00	
All of	1	39	21	636.58	
All of	3	39	21	642.66	
All of	5	39	21	641.44	
All of	7	39	21	644.86	
All of	9	39	21	640.00	
All of	11	39	21	640.00	
All of	1	38	22	639.64	
E. ½ of sec.	11	38	22	320.00	
All of	13	38	22	640.00	
S. ½ of sec.	15	38	22	320.00	
All of	17	38	22	640.00	
All of	19	38	22	639.84	
All of	21	38	22	640.00	
All of	13	37	22	640.00	
All of	23	37	22	640.00	
All of	25	37	22	640.00	
All of	27	37	22	640.00	
All of	35	37	22	640.00	
All of	3	25	7	645.76	
N. ½ of sec. & SE. ¼	5	25	7	484.58	

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
All of	9	25	7	640.00	
All of	11	25	7	640.00	
W. ½ of NW. ¼ & W. ½ of SW. ¼	13	25	7	160.00	
All of	15	25	7	640.00	
E. ½ of sec	17	25	7	320.00	
All of	21	25	7	640.00	
All of	23	25	7	640.00	
All of	25	25	7	640.00	
All of	27	25	7	640.00	
E. ½ of sec	29	25	7	320.00	
All of	33	25	7	640.00	
All of	35	25	7	640.00	
All of	1	26	7	640.36	
All of	3	26	7	638.70	
All of	9	26	7	640.00	
All of	11	26	7	640.00	
All of	13	26	7	640.00	
All of	23	26	7	640.00	
All of	25	26	7	640.00	
All of	35	26	7	640.00	
W. ½ of NW. ¼ & W. ½ of SW. ¼	19	25	8	160.00	
SW. ¼ S. ½ of NW. ¼ & NW. ¼ of NW. ¼	31	25	8	280.68	
W. ½ of sec	5	26	8	320.80	
All of	7	26	8	638.96	
All of	17	26	8	640.00	
All of	19	26	8	639.58	
W. ½ of sec	21	26	8	320.00	
All of	29	26	8	640.00	
All of	31	26	8	639.54	
W. ½ of s c	33	26	8	320.00	
All of	23	38	22	640.00	
All of	25	38	22	640.00	
All of	27	38	22	640.00	
All of	29	38	22	640.00	
All of	31	38	22	638.40	
All of	33	38	22	640.00	
All of	35	38	22	640.00	
All of	3	39	22	638.66	
All of	5	39	22	639.84	
All of	7	39	22	637.12	
All of	9	39	22	640.00	
N. ½ of sec	17	39	22	320.00	
All of	37	39	21	639.36	
All of	13	36	23	640.00	
All of	15	36	23	640.00	
All of	21	36	23	640.00	
All of	23	36	23	640.00	
All of	25	36	23	660.00	
All of	27	36	23	640.00	
All of	29	36	23	640.00	
All of	31	36	23	639.58	
All of	33	36	23	640.00	
All of	35	36	23	640.00	
All of	3	37	23	638.72	
All of	5	37	23	637.45	
All of	7	37	23	638.67	
All of	9	37	23	640.00	

PARTS OF SECTION.	Section.	Township	Range.	Acres.	Remarks.
All of	17	37	23	640.00	
All of	19	37	23	639.76	
All of	7	36	24	643.16	
All of	17	36	24	640.00	
All of	19	36	24	612.52	
All of	21	36	24	640.00	
All of	27	36	24	618.00	
All of	29	36	24	640.00	
All of	31	36	24	640.38	
All of	33	36	24	640.00	
All of	5	38	23	634.28	
All of	7	38	23	638.40	
N. ½ of sec & SW. ¼	19	38	23	482.04	
Total				167,633.67	

GENERAL LAND OFFICE, April 18, 1871.

This list has been carefully examined with the records of this office, found free from conflict, and inuring to the State of Oregon for the purpose indicated.

THOS. CROMWELL,
H. BARBER.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 18, 1871.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to eight, inclusive, is a correct and true list of the tracts of land within the three-mile limits granted to the State of Oregon by the act of Congress approved the 2nd of July, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and the acts of Congress approved the 3rd of March, 1869, to extend the time for the completion of said road, being the vacant and unappropriated lands in the alternate sections designated by odd numbers for three sections in width on each side of said road. And further, it is shown by certificate of the governor of said State, bearing date 12th January, 1870, that said Oregon Central Military road had been completed from Eugene City to the eastern boundary of said State.

I respectfully recommend that the same be approved, subject to any valid interfering rights which may have existed at the date of selection.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the City of Washington, on the day and year first herein above written.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 21, 1871.

Approved, subject to the conditions and rights above mentioned.

C. DELANO,
Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Aug. 8th, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of list No. 2 of lands certified to the State of Oregon, April 21, 1871, for the Oregon Central Military Wagon Road Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of the General Land Office.

EXHIBIT C.

List No. 4, of lands "in place," granted to the State of Oregon by the acts of Congress approved the 2d of July, 1864, and the 3d of March, 1869, "to aid in the construction of a military road from Eugene City to the eastern boundary of said State.

SOUTH OF BASE LINE AND EAST OF WILLAMETTE MERIDIAN, OREGON, OREGON CENTRAL MILITARY WAGON ROAD LIST.

[Three-mile limits. Roseburg district.]

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
All of	29	24	4	640.00	
NE. ¼ & S. fr'l ½	11	24	6	477.80	
Fractional	13	24	6	578.30	
Fractional	15	24	6	322.30	
SE. ¼	17	24	6	160.00	
All of	19	24	6	644.92	
Frac'l	21	24	6	400.80	
Frac'l	23	24	6	3.00	
All of	25	24	6	640.00	
Frac'l	27	24	6	263.60	
Frac'l	29	24	6	397.21	
Frac'l	31	24	6	643.20	
All of	33	24	6	640.00	
All of	35	24	6	640.00	
SW. ¼	5	25	7	160.00	
All of	7	25	7	643.66	
W. ½	17	25	7	320.00	
All of	19	25	7	643.22	
W. ½	29	25	7	320.00	
E. ½ & E. ½ of W. ½	31	25	7	480.00	
All of	1	28	7	640.10	
All of	3	28	7	641.46	
E. ½	9	28	7	320.00	
All of	11	28	7	640.00	
All of	13	28	7	640.00	
All of	15	28	7	640.00	
All of	25	28	7	640.00	
All of	13	27	7	640.00	
E ½	21	27	7	320.00	
S. ½ of S. ½	31	18	1	159.99	
All of	23	21	3	640.00	
Frac'l	35	21	3	604.48	
Frac'l	1	22	3	640.38	
Frac'l	11	22	3	611.60	
All of	13	22	3	640.00	
Frac'l	23	22	3	631.05	
NW. ¼	25	22	3	160.00	
Lots 1, 2, 3, & 4	27	22	3	162.60	
All of	35	22	3	640.00	
Frac'l	3	23	3	635.74	
E. ½ of E. ½ lots 1, 2, 3, & 4	9	23	3	237.05	
All of	15	23	3	640.00	
Frac'l	21	23	3	606.00	
All of	27	23	3	640.00	
Frac'l	33	23	3	638.49	
All of	1	24	3	640.80	

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
Frac'l	3	24	3	611.95	
NE. ¼	9	24	3	160.00	
Frac'l	11	24	3	613.25	
Frac'l	13	24	3	619.25	
NE. ¼	15	24	3	160.00	
All of	1	24	4	640.00	
All of	3	24	4	641.26	
All of	5	24	4	641.23	
All of	7	24	4	642.06	
All of	9	24	4	640.00	
All of	11	24	4	614.90	
Frac'l	15	24	4	625.85	
Frac'l	17	24	4	624.35	
All of	19	24	4	642.00	
All of	21	24	4	640.00	
All of	23	27	7	640.00	
All of	25	27	7	640.00	
E. ½ of	33	27	7	320.00	
All of	35	27	7	640.00	
All of	3	32	9	639.94	
All of	9	32	9	640.00	
All of	15	32	9	640.00	
All of	21	32	9	640.00	
All of	27	32	9	640.00	
All of	3	33	9	642.40	
All of	15	33	9	640.00	
All of	21	33	9	640.00	
All of	27	33	9	640.00	
All of	31	33	9	625.86	
All of	33	33	9	640.00	
All of	35	33	9	640.00	
All of	3	34	9	642.38	
All of	5	34	9	639.80	
All of	7	34	9	642.36	
All of	9	34	9	640.00	
All of	15	34	9	640.40	
All of	17	34	9	640.00	
All of	19	34	9	641.46	
All of	21	34	9	640.00	
All of	23	34	9	640.00	
All of	27	34	9	640.00	
All of	29	34	9	640.00	
All of	31	34	9	640.48	
All of	33	34	9	640.00	
All of	35	34	9	640.60	
All of	1	38	15	638.50	
NE. ¼	3	38	15	161.35	
All of	15	37	16	640.00	
All of	17	37	16	640.00	
All of	19	37	16	638.30	
All of	21	37	16	640.00	
All of	23	37	16	640.00	
All of	25	37	16	640.00	
All of	27	37	16	640.00	
All of	29	37	16	640.00	
All of	31	37	16	641.38	
All of	33	37	16	640.00	
All of	35	37	16	640.00	

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
All of	5	38	17	639.01	
NE. ¼	7	38	17	160.00	
N. ½ & SE. ¼	17	38	17	480.00	
All of	21	38	17	640.00	
All of	1	37	22	640.48	
SE. ¼	3	37	22	160.00	
All of	11	37	22	640.00	
All of	15	37	22	640.00	
W. ½	21	37	23	320.00	
All of	31	37	23	641.96	
All of	29	37	23	640.00	
S. ½	7	36	23	318.71	
SOUTH AND WEST.					
Lot 1	17	17	3	2.14	
Lot 1	21	17	3	4.81	
Lots 1, 2, 3 & 4	23	17	3	77.64	
NW. ¼ of SW. ¼ & lots 1, 2 3, 4, 5, 6, 7, 8 & 9	1	18	3	302.59	
Lots 1, 2, 3, 4, 5 & 6	3	18	3	85.53	
Lots 1, 2, & 3	5	18	3	38.45	
SE. ¼	9	18	3	160.00	
Lot 7	13	18	3	7.48	
Lots 1–6 & 11	17	18	3	65.72	
SE. ¼, S. ½ of SW. ¼ & lot 1	25	18	3	254.84	
S. ½ of NE. ¼, N. ½ of SE. ¼ & lots 1 & 2	27	18	3	231.59	
Lot 1	35	18	3	34.40	
S. ½ of N. ½, N. ½ of S. ½, NE. of NE. NW. ¼ of NW. ¼, SE. ¼ of SE ¼ & lots 1 & 2	15	19	2	518.40	
SE. ¼, S. ½ of NE ¼, lots 1, 2, 3 & 4	7	18	2	300.84	
E. ½ of SW. ¼ & lot 11	9	18	2	102.12	
Lots 2, 3 & 8	15	18	2	24.85	
NW. ¼, N. ½ & SW. ¼ of NE., N. ½ of SW. ¼, W. ½ of SE. ¼ & lots 1, 2, 3, 4 & 5	17	18	2	494.28	
Lots 1 & 2	19	18	2	46.02	
Lots 3, 4, 6, 7, 8, 9, 10, 11 & 12	23	18	2	109.47	
NE. ¼ and lots 1, 2, 3, 4 & 5	25	18	2	315.57	
Lots 1, 2, 3, 4, 5, 6 & 7	31	18	2	177.10	
Lots 1, 2 & 3	33	18	2	84.10	
Lots 6, 7, 8, 9 & 10	5	19	1	132.99	
SW. ¼, SW. ¼ of NW. ¼, W. ½ of SE. ¼, SE. ¼ of SE. ¼	19	18	1	321.05	
NW. ¼, N. ½ of S. ½ & lots 3 & 4	29	18	1	322.32	
S. ½ & NW. ¼ of NE. ¼, E. ½ of NW., E. ½ of SE. ¼ & lots 1, 2, 3, 4, 5, 6, 7, 8 & 9	31	18	1	533.27	
SW. ¼ of SW. ¼ and lots 1, 2, 3, 4, 6, 7, 8 & 9	33	18	1	209.36	
Lots 2 & 3	35	18	1	48.02	

SOUTH AND EAST.

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
All of	1	31	9	638.34	
All of	3	31	9	638.96	
Frac'	9	31	9	286.20	
All of	11	31	9	640.00	
All of	13	31	9	640.00	
All of	15	31	9	640.00	
Frac'l	17	31	9	150.82	
All of	21	31	9	640.00	
All of	23	31	9	640 00	
All of	25	31	9	640.00	
All of	27	31	9	640.00	
Frac'l	29	31	9	30.45	
Frac'l	33	31	9	439.51	
All of	35	31	9	640.00	
All of	1	32	9	641.25	
All of	11	32	9	640.00	
All of	13	32	9	640.00	
All of	23	32	9	640.00	
All of	25	32	9	640.00	
All of	33	32	9	640.00	
All of	35	32	9	640.00	
All of	1	33	9	642.20	
All of	9	33	9	640 00	
All of	11	33	9	640.00	
All of	13	33	9	640.00	
All of	23	33	9	640.00	
All of	25	33	9	640.00	
All of	1	34	9	640.12	
All of	11	34	9	640.00	
All of	13	34	9	640.00	
All of	25	34	9	640 00	
N. $\frac{1}{2}$ of N. $\frac{1}{2}$	31	35	14	158.25	
N. $\frac{1}{2}$ of	33	35	14	320.00	
All of	35	35	14	640.00	
All of	7	31	10	641 18	
All of	31	31	10	642 64	
All of	7	32	10	639.78	
All of	19	32	10	633.92	
All of	29	32	10	640.00	
All of	31	32	10	633 50	
All of	33	32	10	640.00	
All of	5	33	10	637.67	
All of	7	33	10	632.82	
All of	9	33	10	640.00	
All of	17	33	10	640.00	
All of	19	33	10	640.00	
All of	21	33	10	640.00	
All of	29	33	10	640.00	
All of	31	33	10	639.20	
All of	33	33	10	640.00	
All of	1	38	16	640.00	
All of	3	38	16	639.54	
All of	5	38	16	634.43	
All of	9	38	16	640.00	
All of	11	38	16	640.00	
All of	13	38	16	640.00	
All of	21	38	16	640 00	

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
All of	1	36	23	639.78	
All of	3	36	23	638.40	
All of	9	36	23	640.60	
All of	17	36	23	640.00	
All of	19	36	23	638.72	
NW. ¼ & S. ½	7	38	17	480.82	
SW. ¼	17	38	17	160.00	
All of	19	38	17	640.80	
All of	27	38	17	640.00	
All of	29	38	17	640.00	
All of	31	38	17	640.00	
All of	33	38	17	640.00	
All of	35	38	17	640.00	
All of	25	36	22	640.00	
All of	35	36	22	640.00	
NE. ¼	3	37	22	160 26	
NE. ¼	21	37	22	160.00	
S. ½	5	36	24	320.00	
Frac'l	9	36	24	635.80	
Total				113,504 91	

General Land Office,
December 5, 1871.

This list has been carefully examined with the records of this office, found free from conflict, and inuring to the State of Oregon for the purpose indicated.

W. K. Mendenhall.

Department of the Interior,
General Land Office,
December 5, 1871.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to seven, inclusive, is a correct and true list of the tracts of land within the three-mile limits granted to the State of Oregon by the act of Congress, approved the 2nd of July, 1864, entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and the acts of Congress approved the 3rd of March, 1869, to extend the time for the completion of said road, being the vacant and unappropriated lands in the alternate sections designed by odd numbers for three sections in width on each side of said road. And further, it is shown by the certificate of the governor of said State, bearing date 12th

January, 1870, that said Oregon central military road had been completed from Eugene City to the eastern boundary of said State.

I respectfully recommend the same to be approved, subject to any valid interfering rights which may have existed at the date of selection.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the city of Washington on the day and year first hereinabove written.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 8th December, 1871.

Approved subject to the conditions and rights above mentioned.

C. DELANO,
Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Aug. 8th, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of list No. 4 of lands certified to the State of Oregon, December 8, 1871, for the Oregon Central Military Wagon Road Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of the General Land Office.

EXHIBIT D.

List No. 6 of lands "in place" granted to the State of Oregon by acts of Congress approved the 2nd of July, 1864, and the 3rd of March, 1869, to aid in the construction of a military road from Eugene City to the eastern boundary of said State.

SOUTH OF BASE LINE AND EAST OF WILLAMETTE MERIDIAN, OREGON.—OREGON CENTRAL MILITARY WAGON ROAD.—LIST.

[Three-mile limits. Roseburg district.]

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
All of	5	27	8	626.92	
All of	7	27	8	644.84	
W. ½ of sec	9	27	8	320.00	
All of	17	27	8	640.00	
All of	18	27	8	649.08	
W. ½ of sec	21	27	8	320.00	
All of	29	27	8	640.00	
All of	31	27	8	649.06	
W. ½ of sec	33	27	8	320.00	
All of	3	28	8	641.62	
All of	5	28	8	641.48	
All of	7	28	8	650.94	
All of	9	28	8	640.00	
All of	11	28	8	640.00	
All of	15	28	8	640.00	
All of	17	28	8	640.00	
All of	18	28	8	652.96	
All of	21	28	8	640.00	
All of	23	28	8	640.00	
All of	25	28	8	640.00	
All of	27	28	8	640.00	
All of	29	28	8	640.00	
All of	31	28	8	647.80	
All of	33	28	8	640.00	
All of	35	28	8	640.00	
All of	1	29	8	638.62	
All of	3	29	8	645.24	
E. ½ of sec	5	29	8	323.48	
All of	9	29	8	640.00	
All of	11	29	8	640.00	
All of	13	29	8	640.00	
All of	15	29	8	640.00	
E. ½ of sec	17	29	8	320.00	
All of	7	24	7	656.38	
All of	17	24	7	640.00	
All of	19	24	7	658.58	
All of	29	24	7	640.00	
All of	31	24	7	651.48	
All of	33	24	7	640.00	
Total				23,458.48	

GENERAL LAND OFFICE,
March 29th, 1873.

This list has been carefully examined with the records of this office, found free from conflict, and inuring to the State of Oregon for the purpose indicated.

W. J. DRUMMOND.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 31st, 1873.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing on pages one to two, inclusive, is a true and correct list of the tracts of land within the three mile limits granted to the State of Oregon by the act of Congress approved July 2nd, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and the act of Congress approved March 3rd, 1869, to extend the time for the completion of said road; being the vacant and unappropriated lands in the alternate sections designated by odd numbers for three sections in width on each side of said road.

And further it is shown by the certificate of the governor of said State, bearing date January 12th, 1870, that said Oregon Central Military Road had been completed from Eugene City to the eastern boundary of said State.

I respectfully recommend that the same be approved, subject to any valid interfering rights which may have existed at the date of selection.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the city of Washington, on the day and year first herein written.

[SEAL.]

WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 2d April, 1873.

Approved, subject to the conditions and rights above mentioned.

B. R. COWEN,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Aug. 8th, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of List No. 6 of lands certified to the State of Oregon, April 2d, 1873, for the Oregon Central Military Wagon Road Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of the General Land Office.

EXHIBIT E.

List No. 3, embracing indemnity lands granted to the State of Oregon by the acts of Congress approved the 2nd of July, 1864; the 26th of December, 1866, and the 3d of March, 1869, to aid in the construction of a military road from Eugene City to the eastern boundary of said State.

SOUTH OF BASE LINE AND WEST OF WILLAMETTE MERIDIAN, OREGON.—OREGON CENTRAL MILITARY WAGON ROAD.—LIST.

[Indemnity limits. Roseburg district.]

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
Lots No. 5 & 6.....	19	17	2	32 36	
SW. ¼ of NW. ¼ & lots Nos. 1, 2, 3, 4, 5, 7 & 14.....	20	17	2	257 74	
NE. ¼ of SW. ¼.....	7	18	1	40 00	
Lots 5, 6, 7, 9 & 10.....	9	18	2	140 32	
SE. ¼ of NE. ¼, W. ½ of NE. ¼, E. ½ of NW. ¼, & lots 3, 4, 5, 6 & 7.....	12	18	2	324 32	

SOUTH AND EAST.

Parts of Section.	Section.	Township.	Range.	Acres.	Remarks.
All of	1	38	19	641.70	
All of	11	38	19	640.00	
NW. ¼	13	38	19	160.00	
All of	15	38	19	640.00	
All of	17	38	19	640.00	
All of	19	38	19	638.18	
All of	21	38	19	640.00	
All of	29	38	19	160.00	
NW. ¼	25	34	19	640.00	
All of	27	39	19	640.00	
All of					
S. ½ of sec., S. ½ of NE. ¼ of S. ½ of NW. ¼	29	39	19	480.00	
All of	31	39	19	639.08	
All of	33	39	19	640.00	
All of	35	39	19	640.00	
All of	25	37	20	640.00	
All of	27	37	20	640.00	
All of	29	37	20	640.00	
All of	31	37	20	638.18	
All of	33	37	20	640.00	
All of	35	37	20	640.00	
All of	1	38	20	638.50	
All of	3	38	20	638.92	
All of	5	38	20	637.20	
All of	7	38	20	479.08	
W. ½ of sec. & NE. ¼	11	38	20	480.00	
NE. ¼					
SE. ¼ S. ½ of SW. ¼ & E. ½ of NE. ¼	15	39	20	320.00	
S. ½ of sec. & NE. ¼	17	39	20	480.00	
All of	19	39	20	638.58	
All of	21	39	20	640.00	
All of	23	39	20	640.00	
All of	25	39	20	640.00	
All of					
E. ½ of NE. ¼, E. ½ of SE. ¼, & lots No. 1 & 2	27	39	20	161.70	
Fract. sec.	29	39	20	370.50	
NE. ¼	25	39	20	160.00	
S. ½ of sec.	9	39	21	320.00	
S. ½ of SW. ¼	33	35	14	80.00	
E. ½ of sec.	5	30	8	320.30	
All of	7	30	8	649.44	
All of	9	30	8	640.00	
All of	17	30	8	640.00	
All of	19	30	8	648.75	
Fr'l sec.	21	30	8	135.20	
Fr'l sec.	29	30	8	481.68	
N. ½ of sec. & SE. ¼	31	30	8	440.72	
Fr'l sec.	33	30	8	119.40	
Total				23,475.66	

GENERAL LAND OFFICE,
April 18, 1871.

This list has been examined with the records of this office, found free from conflict and inuring to the State of Oregon, for the purpose indicated.

THOS. CROMWELL.
H. BARBER.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
April 18th, 1871.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing on pages one and two, is a correct and true list of the tracts of land outside the three and within the six mile limits granted to the State of Oregon by the act of Congress approved the 2d of July, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," as amended by the acts of Congress approved December 26th, 1866, and March 3rd, 1869, being the vacant and unappropriated lands in the alternate sections designated by odd numbers and selected in lieu of the lands reserved and otherwise appropriated within the three mile limits of said road. And further, it is shown by certificate of the governor of said State, bearing date 12th January, 1870, that said Oregon Central Military Road had been completed from Eugene City to the eastern boundary of said State.

I respectfully recommend that the same be approved subject to any valid interfering rights which may have existed at the date of selection.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the city of Washington, on the day and year first herein above written.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 21st, 1871.

Approved, subject to the conditions and rights above mentioned.

C. DELANO,
Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Aug. 8th, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of list

No. 3, of lands certified to the State of Oregon, April 21, 1871, for the Oregon Central Military Wagon Road Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of the General Land Office.

EXHIBIT F.

List No. 5, embracing indemnity lands granted to the State of Oregon by the acts of Congress approved the 2nd of July, 1864, the 26th of December, 1866, and the 3rd of March, 1869, "to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

SOUTH OF BASE LINE AND EAST OF WILLAMETTE MERIDIAN, OREGON.—OREGON CENTRAL MILITARY WAGON ROAD.—LIST.

[Indemnity limits, Roseburg district.]

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
E. ½	21	28	7	320	
All of	23	28	7	640	
All of	27	28	7	640	
All of	35	28	7	640	
All of	1	29	7	642.12	
All of	3	29	7	641.92	
All of	13	29	7	640	
All of	17	33	5	640	
All of	23	33	5	640	
All of	7	37	16	635.12	
All of	9	37	16	640	
All of	11	37	16	640	
All of	15	37	18	640	
SOUTH AND WEST.					
NE. ¼ of SE. ¼	25	19	2	40	
SOUTH AND EAST.					
All of	9	31	30	641.28	
All of	11	34	24	640	
SE. ¼	13	36	22	160	
SE. ¼	3	37	22	160	
Total				9,040.44	

GENERAL LAND OFFICE,
Decr. 5, 1871.

This list has been carefully examined with the records of this Office, found free from conflict, and inuring to the State of Oregon for the purpose indicated.

W. K. MENDENHALL.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 5th, 1871.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing on page one, is a correct and true list of the tracts of land outside the three mile and within the six mile limits granted to the State of Oregon, by the act of Congress approved the 2d July, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," as amended by the acts of Congress approved December 26, 1866, and March 3, 1869, being the vacant and unappropriated lands in the alternate sections designated by odd numbers and selected in lieu of the lands reserved and otherwise appropriated within the three mile limits of said road. And further it is shown by certificate of the governor of said State, bearing date 12th January, 1870, that the said Oregon Central Military Road had been completed from Eugene City to the eastern boundary of said State.

I respectfully recommend that the same be approved subject to any valid interfering rights which may have existed at the date of selection.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed at the city of Washington, on the day and year first herein above written.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR.
WASHINGTON, D. C., 8th Dec., 1871.

Approved, subject to the conditions and rights above mentioned.

C. DELANO,
Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Aug. 8th, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of List No. 5, of lands certified to the State of Oregon December 8th, 1871, for the Oregon Central Military Wagon Road Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of the General Land Office.

EXHIBIT G.

List No. 7, embracing indemnity lands granted to the State of Oregon by the acts of Congress approved the 2nd of July, 1864, the 26th of December, 1866, and the 3rd of March, 1869, "to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

SOUTH OF BASE-LINE AND EAST OF WILLAMETTE MERIDIAN, OREGON.
OREGON CENTRAL MILITARY WAGON-ROAD.—LIST.

[Six-mile limits. Roseburg district.]

PARTS OF SECTION.	Section.	Township.	Range.	Acres.	Remarks.
All of	21	24	7	641	
All of	25	24	7	640	
All of	27	24	7	640	
All of	35	24	7	640	
All of	19	24	8	629.14	
All of	29	24	8	640	
All of	31	24	8	629.80	
Total	.....	.....	....	4,459.94	

GENERAL LAND OFFICE,
March 29, 1873.

This list has been carefully examined with the records of this office, found free from conflict, and inuring to the State of Oregon, for the purpose indicated.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 31, 1873.

I, Willis Drummond, Commissioner of the General Land Office, do hereby certify that the foregoing on page 1, is a true and correct list of the tracts of land outside the three and within the six mile limits, granted to the State of Oregon by the act of Congress, approved the 2nd of July, 1864, entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State," as amended by the acts of Congress approved December 26, 1866, and March 3, 1869, being the vacant and unappropriated lands in the alternate sections designated by odd numbers and selected in lieu of the lands reserved and otherwise appropriated within the three mile limit of said road. And further it is shown by the certificate of the governor of said State, bearing date January 12, 1870, that said Oregon Central Military Road had been completed from Eugene City to the eastern boundary of said State.

I respectfully recommend that the same be approved, subject to any valid interfering rights which may have existed at the date of selection.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the city of Washington, on the day and year first herein above written.

[SEAL.] WILLIS DRUMMOND,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 2nd April, 1873.

Approved, subject to the conditions and rights above mentioned.

E. R. COWEN,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Aug. 8th, 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of List No. 7, of lands certified to the State of Oregon, April

2, 1873, for the Oregon Central Military Wagon Road Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.] W. M. STONE.

Acting Commissioner of the General Land Office.

EXHIBIT H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August , 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the patent issued to the Oregon Central Military Wagon Road Company, July 15th, 1884, for lands in the State of Oregon, is a true and literal exemplification from the record thereof in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.] W. M. STONE.

Acting Commissioner of General Land Office.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Whereas, by the act of Congress approved July 2, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," there is granted "alternate sections of public land, designated by odd numbers, for three sections in width on each side of said road, provided that the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever; and provided further, that any and all lands heretofore reserved to the United States by act of Congress, or other competent authority, be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate

the route of said road through the same, in which case the right of way is granted.'

And whereas, by the act of the legislative assembly of the State of Oregon, approved October 24, 1864, the aforesaid grant was conferred upon the Oregon Central Military Road Company.

And whereas it is shown by certificate on file by the governor of said State of Oregon, bearing date January 12, 1870, that the said Oregon central military road had been completed from Eugene City to the eastern boundary of said State of Oregon in conformity with said act of Congress of July 2, 1864.

And whereas in pursuance of the act of Congress approved June 18, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," the successor to the Oregon Central Military Road Company has applied for a conveyance of the title by patent to the lands thereby granted.

And whereas certain tracts of land have been selected under the act aforesaid by B. J. Pengra, the duly authorized land agent of said Military Road Company, as shown by his original list of selections dated February 3, 1871, and certified under date of February 16, 1871, by the register and receiver at Roseburg, Oregon.

Said tracts of land lie coterminous to the constructed line of road and are particularly described as follows, to wit:

SOUTH OF BASE LINE AND WEST OF WILLAMETTE PRINCIPAL MERIDIAN, OREGON.

Roseburg district, township eighteen, range three.

The lots numbered one, four, six, seven, eight, nine, ten, eleven, and twelve, of section eleven, containing one hundred and ninety-five acres and thirty-four one-hundredths of an acre. The northeast quarter of the southeast quarter, the south half of the southeast quarter, south half of the southwest quarter, and the lots numbered one, two, three, four, five, and six, of section fifteen, containing three hundred and fifty-four acres and eight one-hundredths of acre.

The said tracts of land as above described make the

aggregate area of (549.42) five hundred and forty-nine acres and forty-two one-hundredths of an acre.

Now know ye, that the United States of America, in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant, unto the said Oregon Central Military Road Company, as beneficiary of said grant to the said State of Oregon, and to its assigns the tracts of land selected as aforesaid and described in the foregoing.

To have and to hold the said tracts with the appurtenances unto the said Oregon Central Military Road Company, and to its assigns forever.

In testimony whereof, I, Chester A. Arthur, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this 15th day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

CHESTER A. ARTHUR.

By the President:

M. McKEAN,
Secretary.

[SEAL.] S. W. CLARK,
Recorder of the General Land Office.

EXHIBIT I.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August , 1889.

I, W. M. Stone, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the patent issued to the Oregon Central Military Wagon Road Company, July 10, 1883, for lands in the State of Oregon, is a true and literal exemplification from the record thereof in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.] W. M. STONE,
Acting Commissioner of General Land Office.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Whereas, by the act of Congress approved July 2, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," "there is granted" alternate sections of public land designated by odd numbers for three sections in width on each side of said road; provided, that the lands hereby granted shall be exclusively applied in the construction of said road and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever; and provided further, that any and all lands heretofore reserved to the United States by act of Congress, or other competent authority, be and the same are reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted.

And whereas by the act of the legislative assembly of the State of Oregon, approved October 24, 1864, the aforesaid grant was conferred upon the Oregon Central Military Road Company:

And whereas, it is shown by certificates on file by the governor of said State of Oregon, bearing date January 12, 1870, that the said Oregon Central Military road had been completed from Eugene City to the eastern boundary of said State of Oregon, in conformity with said act of Congress of July 2, 1864:

And whereas, in pursuance of the act of Congress approved June 18, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," the successor to the Oregon Central Military Road Company has applied for a conveyance of the title by patent to the lands thereby granted:

And whereas, certain tracts of land have been selected under the act aforesaid by *Feorge* E. Strong, the duly authorized land agent of the California and Oregon Land Company, successor to the Oregon Central Military Road Company, as shown by his original lists of selections, dated July 22, 1878, and December 5, 1879, and certified under

dates of July 22, 1878, and December 1, 19, 1879, by the register and receiver at Lakeview, Oregon.

The said tracts of land lie coterminous to the constructed line or road and are particularly described as follows, to wit:

SOUTH OF BASE LINE AND EAST OF THE WILLAMETTE PRINCIPAL MERIDIAN, OREGON.

Township thirty-nine, range seventeen.

The lots numbered one and two, the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section three, containing one hundred and fifty-nine acres and fifty-six one-hundredths of an acre. All of section five, containing six hundred and thirty-nine acres and fifty one-hundredths of an acre. All of section nine, containing six hundred and forty acres. The northeast quarter, the southwest quarter of the northwest quarter, and the east half of the southeast quarter of section eleven, containing two hundred and eighty acres. All of section thirteen, containing six hundred and forty acres. The northwest quarter of the northwest quarter, the south half of the northwest quarter, the south half of the southeast quarter, and the southwest quarter of section 23, containing three hundred and sixty acres.

Township thirty-six, range twenty-five.

All of section twenty-five, containing six hundred and forty acres.

Township thirty-six, range twenty-six.

All of section nineteen, containing six hundred and forty acres and ninety-eight one-hundredths of an acre. The southwest quarter, and the south half of the southeast quarter of section seven, containing two hundred and forty acres and thirty one-hundredths of an acre. All of section seventeen, containing six hundred and forty acres. All of section twenty-one, containing six hundred and forty acres. All of section twenty-seven, containing six hundred and forty acres. All of section twenty-nine, containing six hundred and forty acres. All of section thirty-one, containing six hundred and forty acres and ninety-eight one-hundredths

of an acre. All of section thirty-three, containing six hundred and forty acres.

Township thirty-seven, range twenty six.

All of section five, containing six hundred and thirty-eight acres and eighty-eight one-hundredths of an acre. All of section seven, containing six hundred and forty acres and ninety-nine one-hundredths of an acre. All of section fifteen, containing six hundred and forty acres. All of section seventeen, containing six hundred and forty acres. The north half of the northeast quarter, and the north half of the northwest quarter of section twenty-one, containing one hundred and sixty acres.

Township thirty-six, range twenty-eight.

All of section twenty-three, containing six hundred and forty acres. All of section twenty-five, containing six hundred and forty acres. All of section twenty-seven, containing six hundred and forty acres.

Township thirty-five, range thirty-three.

The south half of the northeast quarter, the south half of the northwest quarter, and the south half of section eleven, containing four hundred and eighty acres. All of section thirteen, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres. All of section twenty-seven, containing six hundred and forty acres. All of section thirty-five, containing six hundred and forty acres.

Township thirty-six, range thirty-three.

All of section one, containing six hundred and forty acres and forty-two one-hundredths of an acre. All of section three, containing six hundred and forty acres and forty-two one-hundredths of an acre. All of section eleven, containing six hundred and forty acres. The north half of section fifteen, containing three hundred and twenty acres.

Township thirty-seven, range thirty-six.

All of section one, containing six hundred and forty acres and seventy-six one-hundredths of an acre. All of section

three, containing six hundred and forty acres and sixty one-hundredths of an acre. All of section five, containing six hundred and thirty-eight acres and forty-eight one-hundredths of an acre. The east half of section nine, containing three hundred and twenty acres. All of section eleven, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. The north half of the northeast quarter, the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section twenty-one, containing two hundred acres. All of section twenty-three, containing six hundred and forty acres. The north half of the northeast quarter, and the north half of the northwest quarter of section twenty-five, containing one hundred and sixty acres. The northeast quarter of the northeast quarter of section twenty-seven, containing forty acres.

Township thirty-six, range thirty-six.

The east half of the northeast quarter, southeast quarter, and the east half of the southwest quarter of section thirteen, containing three hundred and twenty acres. The west half of the northwest quarter, the west half of the southwest quarter, the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section fifteen, containing two hundred and forty acres. All of section twenty-one, containing six hundred and forty acres. The south half of the northeast quarter, the south half of the northwest quarter, the northwest quarter of the northwest quarter, and the south half of section twenty-three, containing five hundred and twenty acres. All of section twenty-five, containing six hundred and forty acres. All of section twenty-seven, containing six hundred and forty acres. All of section thirty-one, containing six hundred and forty-one acres and sixty one-hundredths of an acre. All of section thirty-three, containing six hundred and forty acres. All of section thirty-five, containing six hundred and forty acres.

Township thirty-three, range thirty-nine.

All of section thirteen, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres.

Township thirty-one, range forty-one.

The west half of section thirteen, containing three hundred and twenty acres. All of section seventeen, containing six hundred and forty acres.

Township thirty, range forty-four.

All of section nine, containing six hundred and forty acres. All of section fifteen, containing six hundred and forty acres. All of section twenty-one, containing six hundred and forty acres. All of section twenty-three, containing six hundred and forty acres. The northeast quarter and the west half of section twenty-five, containing four hundred and eighty acres. The northeast quarter of section twenty-seven, containing one hundred and sixty acres.

Township thirty, range forty-five.

All of section one, containing six hundred and forty acres and seventy-five one-hundredths of an acre. The southeast quarter, south half of the northeast quarter, the south half of the northwest quarter, the east half of the southwest quarter, and the lots numbered one, two, three and four of section three, containing five hundred and sixty-three acres and sixteen one-hundredths of an acre. The northwest quarter, the west half of the northeast quart', the southeast quarter of the northeast quarter, and the sough half of section nine, containing six hundred acres. All of section seventeen, containing six hundred and forty acres. All of section nineteen, containing six hundred and forty-four acres and twenty one-hundredths of an acre.

Township thirty, range forty-six.

The southeast quarter, the south half of the northeast quarter, the south half of the northwest quarter, the east half of the southwest quarter, the northwest quarter of the southwest quarter, and the lots numbered one, two, three and four of section one, containing five hundred and ninety-nine acres and twelve one-hundredths of an acre. The north half of the southeast quarter, the north half of the southwest quarter, the south half of the northeast quarter, the south half of the northwest quarter, the southwest quarter of the southwest quarter, and the lots numbered one,

two, three and four of section three, containing five hundred and eighteen acres and sixty-seven one-hundredths of an acre. The lot numbered one, and the south half of section five, containing three hundred and fifty-nine acres and fifty-nine one-hundredths of an acre. The southeast quarter, the west half of the northeast quarter, and the west half of section nine, containing five hundred and sixty acres. The southwest quarter of the southwest quarter of section eleven, containing forty acres. The northwest quarter and the south half of the northeast quarter of section thirteen, containing two hundred and forty acres.

Township thirty, range forty-seven.

The lots numbered one, two, and three of section seven, containing one hundred and twelve acres and eighty-six one-hundredths of an acre.

The said tracts of land, as described in the foregoing, make the aggregate area of (40,363.82) forty thousand three hundred and sixty-three acres and eighty-two one-hundredths of an acre.

Now know ye, that the United States of America, in consideration of the premises, and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant, unto the said Oregon Central Military Road Company, as beneficiary of said grant to the said State of Oregon, and to its assigns, the tracts of land selected as aforesaid and described in the foregoing.

To have and to hold the said tracts with the appurtenances unto the said Oregon Central Military Road Company and to its assigns forever.

In testimony whereof I, Chester A. Arthur, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this tenth day of July, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[SEAL.] CHESTER A. ARTHUR.

By the President: W. H. CROOK, Secretary.

WM. H. WALKER,
Recorder of the General Land Office ad interim.

EXHIBIT J.

The Oregon Central Military Road Company to B. J. Pengra.

This indenture made and entered into at the city of Portland, Multnomah County, in the State of Oregon, this 12th day of May, A.D. 1874, between the "Oregon Central Military Road Company," a corporation incorporated, organized, and existing under the laws of the State of Oregon, party of the first part, and B. J. Pengra, of the said State of Oregon, party of the second part, witnesseth, that the said party of the first part, "The Oregon Central Military Road Company" corporation as aforesaid, in consideration of one dollar and other considerations, it hereunto moving and to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has aliened, released, granted, bargained, and sold and does hereby alien, release, grant, bargain, sell, and convey unto the said B. J. Pengra, the party of the second part, his heirs and assigns, the undivided one-half of all the right, title, and interest of the said party of the first part in and to all the lands lying and being in the State of Oregon granted or intended to be granted to the State of Oregon by the act of Congress approved July 2nd, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State and by an act of Congress approved December 26, 1866, entitled "An act to amend an act entitled an act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State and granted by the State of Oregon to the said Oregon Central Military Road Company by an act of the legislative assembly of said State of Oregon, approved October 24, 1864, entitled "An act donating certain lands to the Oregon Central Military Road Company," which several acts are hereby made parts hereof, and the undivided one-half of the right, title, and interest of said party of the first part to said grant of land under the several acts aforesaid, whether listed and approved or otherwise; also the undivided one-half of all future right, title, interest, claim, property, and demand which the party of the first part may

at any time hereafter acquire to any lands by virtue of an further compliance with the requirements of said acts of Congress, together with the hereditaments and appurtenances, reserving and excepting from this conveyance, however, all sales of said lands heretofore made by the party of the first part, not exceeding seven thousand acres, and also reserving and excepting from this conveyance the right of way granted by said first-mentioned act of Congress to the said State of Oregon through the lands of the United States and also a right of way one hundred feet in width upon each side of the center line of the travelled road of the party of the first part wherever the same runs through or is constructed or located upon the lands granted by said act of Congress, together with suitable and sufficient grounds, to be selected by the party of the first part or its assigns, for the purposes of toll-houses, depot grounds, water-tanks, switches, warehouses, or turnouts for a railroad should one be constructed over said route: To have and to hold the lands hereby granted unto the said party of the second part, his heirs, and assigns, forever, subject to the reservations hereinbefore contained and subject also to the covenants, conditions, and reservations hereinafter contained.

And whereas the governor of the State of Oregon within the time limited by law certified to the Secretary of the Interior that the road of the party of the first part had been constructed for the distance of about 460 miles, and whereas the amount of about 363,000 acres of land under said grant has been listed in accordance with law and the lists approved by the Secretary of the Interior, as will more fully appear by reference to said lists from one to twelve inclusive now on file in the office of the Secretary of State of the State of Oregon, and whereas as the United States surveys shall be extended along the line of said road it will be necessary for the owners of said grant to select, list, and cause to be approved the lands through which the said party of the first part or its assigns will be entitled under said acts, and whereas such selection, listing, and approval is attended with costs and expenses, this conveyance is upon the express condition and the said party of the second part hereby covenants for himself and his assigns that if

said party of the first part shall remain the owner of such remaining undivided one-half of said grant or any portion thereof the listing of the unlisted portion of said grant shall be made under the supervision of the party of the first part and in any event the said party of the second part, his heirs or assigns, shall bear and pay the one-half of all costs and expenses of selecting, listing, and procuring the approval of said lands hereby conveyed shall be and remain subject to such costs and expenses. And whereas said lands so far as listed and approved are subject to taxation it is hereby agreed that the said party of the second part, his heirs and assigns, shall promptly pay one-half of all taxes hereafter legally assessed against the said lands or any of them, so as not to involve the remaining one-half in costs, expenses, or litigation.

And if the said party of the first part shall so demand at any time after the expiration of sixty days from the date hereof said lands shall be valued, graded, and placed in the market for sale in the manner following, that is to say, the said "Oregon Central Military Road Company shall select one appraiser and said party of the second part shall select one appraiser to go upon said lands and ascertain the quality and value thereof and grade said lands and fix the price at which the same may be sold, and if such two appraisers shall fail to agree upon the price to be fixed upon said lands the two may choose a third to act with them, who shall in like manner proceed to ascertain the value of said lands, and thereafter any two of such three appraisers may fix and determine the value of said lands, and thereupon, if either party desire it, such lands shall be offered for sale for the price so agreed upon and sales may be negotiated by the said party of the first part, its officers or agents, and by the party of the second part, his heirs, assigns, agents, or attorneys at the price so fixed, and the conveyance therefor shall be executed at the office of the company at Portland, Oregon, and the party of the second part, his heirs or assigns, shall constitute some person residing at the city of Portland, Oregon, an attorney in fact, with full power under the laws of Oregon to execute all necessary deeds for said lands, and the proceeds of such sales, after

deducting the costs and expenses of sales and conveyancing without commissions to either party, shall be divided equally between the party of the first part or its assigns and the party of the second part, his heirs or assigns.

Provided, however, that if the said party of the second part shall, after being notified for thirty days that the party of the first part has selected such appraiser upon its part, shall neglect or fail to select such appraiser on his part, his heirs or assigns shall be deemed to have waived the right to appoint such appraiser, and such neglect shall be deemed a consent that the appraiser so selected by the party of the first part shall act alone in making such appraisements and fixing the prices of said lands, and thereupon said single appraiser may proceed to ascertain the value of said lands and fix the value and price thereof, and thereupon said lands shall be sold at such price, in the manner hereinbefore specified, and the party of the first part shall pay the one-half of the costs and expenses of such appraisement and valuation, and the party of the second part shall pay one-half of such costs and expenses.

And it is further covenanted and agreed that neither the party of the first part, its successors or assigns, nor the party of the second part, his heirs or assigns, shall, within five years from the date hereof, without the consent of the other party, his or its heirs, successors, or assigns first had, institute or maintain any suit or proceeding in any of the courts of the State of Oregon, or of the United States within the State or district of Oregon, for a partition, division, or sale of said lands, and this covenant shall be a complete defense to any such suit or proceeding. The party of the first part covenants with the party of the second part, his heirs or assigns, upon demand of the party of the second part, his heirs or assigns, at any time before the dissolution of the party of the first part, to execute to the party of the second part, his heirs or assigns, any proper assignment, release, or quit-claim deed, or other instrument in writing at the proper cost of the party of the second part, his heirs or assigns, necessary or proper to carry out or effectuate the object of this conveyance, to wit, the conveyance to the party of the second part of the undivided one-

half of the title and interest of the party of the first part in and to the grant of lands made by said several acts of Congress and of the legislative assembly of the State of Oregon, or which said party of the second part, his heirs or assigns, shall be advised by counsel learned in the law to be so necessary or proper for the purpose aforesaid.

In witness whereof the said party of the first part has caused its corporate seal to be affixed to these presents, and the same to be signed by its president and secretary by resolution of the board of directors thereof, at the city of Portland, Multnomah County, in the State of Oregon, this 12th day of May, A.D. 1874.

[SEAL.] THE OREGON CENTRAL MILITARY ROAD CO.,
By Theo. Wygant, President.

THE OREGON CENTRAL MILITARY ROAD CO.,
By John M. Drake, Secretary.

Executed in presence of—
J. N. DOLPH,
WM. H. WATKINS.

STATE OF OREGON, }
Multnomah County. } ss.

Be it remembered that on this 12th day of May, 1874, before me, the undersigned, a notary public in and for said county and State, personally appeared Theo. Wygant, president of The Oregon Central Military Road Company, and John M. Drake, secretary of The Oregon Central Military Road Company, whose names are subscribed to the foregoing instrument as parties thereto personally known to me to be the individuals described in and who executed the said instrument, and they severally acknowledged to me that he, the said Theo. Wygant, as president, and he the said John M. Drake, as secretary of the said Oregon Central Military Road Company, executed the same as and for the act and deed of The Oregon Central Military Road Company freely and voluntarily and for the uses and purposes therein mentioned; and the said John M. Drake being by me duly sworn did depose and say that he is the secretary of the said Oregon Central Military Road Company, and resides at Portland, Oregon; that he is the legal custodian of and is acquainted with the corporate seal of said

company; that the seal affixed to the foregoing deed is such corporate seal; that the same was so affixed by him as secretary of said company on the 12th day of May, 1874, by order of the board of directors of said company, and that he signed his name as secretary to said conveyance by the like order of said board of directors.

In witness whereof I have hereunto set my name and affixed my seal of office the day and year first above written.

[SEAL.] JAMES A. SMITH,
Notary Public in & for Oregon.

Filed and recorded May 14, 1874.

JOEL WARE, Co. Clk.

STATE OF OREGON, County of Lane. } ss.

I, Joel Ware, county clerk of Lane County, Oregon, hereby certify that I have compared the foregoing transcript with the original deed as recorded in deed book "J," page 264, on May 14, 1874, Lane County records of deeds, and that it is a true, full, and complete copy, and the whole thereof of said original.

Witness my hand and official seal this 17 day of August, 1889.

[SEAL.] JOEL WARE, Clerk.
By W. R. MCCORNACK, Deputy.

EXHIBIT "K."

O. C. M. Road Co. to B. J. Pengra.

This indenture, made and entered into this 12 day of October, A.D. 1874, between The Oregon Central Military Road Company, a corporation duly incorporated, organized, and existing under the laws of the State of Oregon, having its principal office and place of business at Portland, Multnomah Co., State of Oregon, the party of the first part, and B. J. Pengra, of Lane County, in the State of Oregon, the party of the second part, witnesseth, that the said party of the first part, The Oregon Central Military Road Company, corporation as aforesaid, in consideration of the sum of seventy-five thousand dollars to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has aliened, remised, released, granted, bargained,

and sold, and by these presents it does alien, remise, release, grant, bargain, and sell, and convey unto the said party of the second part, his heirs and assigns, all the right, title, and interest of the said party of the first part in and to all the lands lying and being in the State of Oregon, granted or intended to be granted to the State of Oregon by act of Congress approved July 2d, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and by an act of Congress approved December 26, 1866, entitled "An act to amend an act entitled 'An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State,'" and granted or intended to be granted by the State of Oregon to the said Oregon Central Military Road Company by an act of the legislative assembly of said State approved October 24th, 1864, entitled "An act donating certain lands to the Oregon Central Military Road Company, which several acts are hereby made a part hereof, and all the right, title, and interest acquired by the party of the first part, under the said several acts hereinbefore referred to, and also all future right, title, and interest, claim, property, and demand which the party of the first part may at any time hereafter acquire to any lands by virtue of any further compliance with the requirements of said acts or otherwise (but said party of the first part does not undertake, covenant, or agree to perform any act or thing in that behalf, or assume any obligation therein), together with the appurtenances. It is the intention of the party of the first part to convey to the party of the second part the undivided one-half of all right, title, and interest acquired by it under said acts, being its remaining interest in and to the premises hereinbefore described, together with any and all future interest that it may hereafter acquire by virtue of any further compliance with any of said several acts referred to, reserving and excepting from this conveyance, however, all sales of lands heretofore made by the party of the first part, not exceeding the undivided half and seven thousand acres; and also reserving and excepting from this conveyance the wagon-road of the party of the

first part leading from Eugene City by way of the Middle Fork of the Willamette River to the eastern boundary of the State, and the right of way granted by the said first-mentioned act of Congress to the said State of Oregon through the lands of the United States, and also a right of way for one hundred feet in width upon each side of the center line of the road of the party of the first part wherever the same runs through or is constructed or located upon the lands granted by said acts of Congress, together with suitable and sufficient grounds, to be selected by the party of the first part, or its assigns, for the purpose of toll-houses, depots, grounds, water-tanks, switches, warehouses, or tunnels for a railroad, should the same be constructed over said route.

To have and to hold the lands hereby granted unto the said party of the second part, his heirs and assigns, forever, subject to the reservations hereinbefore contained. And the party of the second part hereby assumes and covenants to pay all taxes that are due or to which said premises are liable for the present fiscal year.

In witness whereof the said party of the first part has caused its corporate seal to be affixed to these presents and the same to be signed by its president and secretary by resolution of its board of directors thereof at the city of Portland, Multonomah County, State of Oregon, this 12th day of October, 1874.

THE OREGON CENTRAL MILITARY ROAD CO.,
By Theo. Wygant, President.
THE OREGON CENTRAL MILITARY ROAD CO.,
[SEAL] By John M. Drake, Secretary.

Executed in presence of—
J. N. DOLPH,
JOSEPH SIMON.

STATE OF OREGON, } ss.
County of Multonomah, }

Be it remembered that on this 12th day of October, 1874, before me, the undersigned, a notary public in and for the said county of Multonomah and State of Oregon, duly commissioned and qualified, personally came Theo. Wygant, president of the Oregon Central Military Road Company,

and John M. Drake, secretary of the Oregon Central Military Road Company, whose names are subscribed to the foregoing indenture as parties thereto, and as the president and secretary of said Oregon Central Military Road Company, both personally known to me to be the individuals named and described in and who executed the same indenture, and they severally acknowledge that he, the said Theo. Wygant, as president, and he, the said John M. Drake, as secretary of the Oregon Central Military Road Company, executed the foregoing conveyance as and for the act and deed of the said Oregon Central Military Road Company freely and voluntarily and for the uses and purposes therein mentioned, and the said John M. Drake, being by me duly sworn, did depose and say that he is the secretary of the Oregon Central Military Road Company, and resides at Portland, Oregon; that he is the legal custodian of and has in his possession and is acquainted with the corporate seal of the said Oregon Central Military Road Company; that the seal affixed to the foregoing conveyance is such corporate seal, and that the same was so affixed by him as secretary of said company on the 12th day of October, 1874, by order of the board of directors of said company; and that he signed his name as secretary thereto by the like order of said board of directors.

In witness whereof I have hereunto set my hand and affixed my official seal the date above written.

[SEAL] JOSEPH SIMON,
Notary Public for Oregon.

Filed and recorded October 20, 1874.

JOEL WARE, Co. Clk.

STATE OF OREGON, }
County of Lane, } ss.

I, Joel Ware, county clerk of Lane County, Oregon, hereby certify that I have compared the foregoing transcript with the original deed as recorded in deed book "J," pages 379, recorded October 20, 1874, in Lane County records of deeds, and that it is a true, full, and complete copy, and the whole thereof of said original.

Witness my hand and official seal this 17th day of August, 1889.

[SEAL] JOEL WARE, Clerk.
By W. R. McCormack, Deputy.

EXHIBIT "L."

B. J. Pengra to G. W. Colby et al.

This indenture, made and entered into this 15th day of May, A. D. 1874, by and between B. J. Pengra and C. E. Pengra, his wife, of Lane County, State of Oregon, the parties of the first part, and G. W. Colby, of Butte, Butte County, in the State of California, John Boggs, of Colusa County, in said State, N. D. Rideout, of Yuba County, State aforesaid, W. H. Parks and R. F. Parks, of said Yuba County, Edgar Mills, of Sacramento County, in said State, E. B. Pond, of San Francisco, Nicholas Lenning, of said San Francisco, W. C. Belcher, of Marysville, California, and F. B. Simpson, of the city of Oakland, Alameda County, in the said State of California, the parties of the second part, witnesseth, that in consideration of the sum of one hundred thousand dollars gold coin of the United States to them in hand paid, the receipt whereof is hereby acknowledged, the said parties of the first part have aliened, released, granted, bargained, sold, and by these presents do alien, release, grant, bargain, sell, and convey unto the said parties of the second part, their heirs and assigns, in the proportions hereinafter specified, the equal undivided one-half of all and singular of lands lying and being in the State of Oregon, granted or intended to be granted to the State of Oregon by act of Congress approved July 2d, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and by an act of Congress approved December 26, 1866, entitled "An act to amend an act entitled an act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of the State," and granted by the State of Oregon to the said Oregon Central Military Road Company by an act of the legislative assembly of said State approved October 24, 1864, entitled "An act donating cer-

tain lands to the Oregon Central Military Road Company, and the undivided one-half of the right, title, and interest acquired by the said Oregon Central Military Road Company to said grant of lands under the several acts aforesaid, whether listed and approved, or otherwise. Also the undivided one-half of all future right, title, interest, claim, property, and demand which the said Oregon Central Military Road Company may at any time hereafter acquire to any lands by virtue of any further compliance with the requirements of said acts of Congress, together with the hereditaments and appurtenances. Reserving and excepting from this conveyance however all sales of said lands heretofore made by the said Oregon Central Military Road Company, not exceeding seven thousand acres. And also reserving and excepting from this conveyance the right of way granted by said first mentioned acts of Congress to the said State of Oregon through the lands of the United States, and also a right of was for one thousand feet in width upon each side of the center line of the travelled road of the said Oregon Central Military Road Company wherever the same runs through or is constructed or located upon the lands granted by said acts of Congress, together with suitable and sufficient grounds for the purpose of toll houses, depot grounds, water tanks, switches, warehouses, or turn-outs for a railroad should one be constructed over said route: to have and to hold all and singular the lands and remises hereby conveyed, to wit, said undivided one-half of all the above-described grant of land listed and to be listed and all the right, title, and interest of the party of the first part therein, together with all and singular the hereditaments and appurtenances thereunto belonging, unto the said parties of the second part, their heirs and assigns forever, as tenants in common thereof, in the following proportion, that is to say: to the said G. W. Colby, John Boggs, N. D. Rideout, Edgar Mills, E. B. Pond, Nicholas Lenning, W. H. Parks, W. C. Belcher, and F. B. Simpson, each an undivided one-tenth part of said undivided one-half thereof and to the said W. H. Parks and R. F. Parks jointly a like undivided one-tenth of said undivided one-half thereof free from all claim, interest, right, or demand of the said parties

of the first part of, in, or to the same, but subject nevertheless to all and singular the reservations, covenants, and conditions contained in the deed of conveyance of the lands herein described and conveyed, heretofore executed by the Oregon Central Military Road Company to the said B. J. Pengra, dated May 12, 1874. The lands hereby granted and conveyed or intended to be conveyed are the same lands designated and described in the above-mentioned deed from the Oregon Central Military Road Company to the said B. J. Pengra, and all and singular the right, title, and interest acquired by the parties of the first part herein or to said lands is hereby intended to be conveyed to the parties of the second part herein, subject, however, to the said covenants and conditions, reservations, and exceptions therein contained.

In witness whereof the parties of the first part have hereunto set their hands and seals the date above written.

B. J. PENGRA. [SEAL]
C. E. PENGRA. [SEAL]

Executed in presence of—
JOEL WARE,
A. S. MCCLURE.

STATE OF OREGON, } ss.
County of Lane. }

This certifies that on this 15th day of May, A.D. 1874, before me, the undersigned, a county clerk in and for said county and State, personally appeared B. J. Pengra and C. E. Pengra, his wife, to me personally known to be the identical persons described in and who executed the foregoing conveyance, and acknowledged to me that they executed the same, and the said C. E. Pengra, wife of the said B. J. Pengra, on a private examination by me made separate and apart from her said husband, acknowledged to me that she executed the same freely and voluntarily and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and official seal this 15th day of May, A.D. 1874.

JOEL WARE, [SEAL]
County Clerk.

Recorded May 15, 1874, Joel Ware, Co. Clk.

STATE OF OREGON, County of Lane. } ss.

I, Joel Ware, county clerk of Lane County, Oregon, hereby certify that I have compared the foregoing transcript with the original deed as recorded in deed book "J," page 268, recorded May 15th, 1874, Lane County records of deeds, and that it is a true, full, and complete copy, and the whole thereof, of said original.

Witness my hand and official seal this 17th day of August, 1889.

[SEAL] JOEL WARE, Clerk.
By W. R. McCornack, Deputy.

EXHIBIT M.

B. J. Pengra to G. W. Colby et al.

This indenture, made and entered into this 15th day of October, A. D. 1874, by and between B. J. Pengra and C. E. Pengra, his wife, of Lane County in the State of Oregon, the parties of the first part, and G. W. Colby, Nicholas Lenning, E. B. Pond, J. M. Peck, Isaac Allen, B. F. Baker, M. P. Jones, C. H. Holbrook, W. C. Belcher, N. D. Rideout, and Isaac Lohamn, all of the State of California, the parties of the second part, witnesseth: That in consideration of the sum of one hundred thousand dollars, gold coin of the United States, to them in hand paid, the receipt whereof is hereby acknowledged, the said parties of the first part have aliened, released, granted, bargained, sold, and by these presents they do alien, release, grant, bargain, sell, and convey unto the said parties of the second part, their heirs and assigns, in proportions hereafter specified, the equal undivided one-half ($\frac{1}{2}$) of all and singular the lands lying and being in the State of Oregon granted or intended to be granted to the State of Oregon by act of Congress, approved July 2d, 1864, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and by an act of Congress, approved Dec. 26, 1866, entitled "An act to amend an act granting lands to the State of Oregon in the construction of a military road from Eugene City to the eastern boundary of said State, and granted or

intended to be granted by the State of Oregon to the Central Military Road Company by an act of the legislative assembly of said State, approved Oct. 24th, 1864, entitled An act donating certain lands to the Oregon Central Military Road Company, whether listed or to be listed, which several acts are hereby made part hereof. And all the right, title and interest acquired by the parties of the first part under a certain conveyance executed to said B. J. Pengra by said Oregon Central Military Road Company upon the 12th day of October, A. D. 1874, or otherwise in and to said lands, and all dower and right of dower of said C. E. Pengra, and also all the right, title, and interest which may be hereafter acquired by the said parties of the first part and to which they may become entitled by any further compliance with the requirements of said acts or either of them by said Oregon Central Military Road Company. Reserving and excepting, however, the lands heretofore sold by said company not exceeding seven thousand acres. Also reserving and excepting from this conveyance the right of way granted by said just-mentioned act of Congress to the State of Oregon through the lands of the United States and also a right of way for one hundred feet in width upon each side of the center line of the traveled road of the said Oregon Central Military Road Company wherever the same runs through or is constructed or located upon the lands granted by said acts of Congress, together with suitable and sufficient grounds to be selected by the said Oregon Central Military Road Company its successors and assigns for the purpose of tollhouses, depots, grounds, water-tanks, switches, warehouses, or turnouts for a railroad, should one be constructed over said route. To have and to hold all and singular the lands and premises hereby conveyed, to wit, said undivided one-half of all the above-described grant of lands listed and to be listed, and all the right, title, and interest of the party of the first part therein.

Together with all and singular the tenements, hereditaments, and appurtenances belonging unto the said parties of the second part, in the following proportions, that is to say: To the said G. W. Colby, four-twentieths; to the said Nicholas Lenning, E. B. Pond, J. M. Peck, Isaac Allen, B.

F. Baker, and M. P. Jones, two-twentieths each; and to the said C. H. Holbrook, W. C. Belcher, N. D. Rideout, and Isaac Lohman, one-twentieth each, from all claim and demand of the parties of the first part and all persons claiming under them.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and date first above written.

B. J. PENGRA. [SEAL]
C. E. PENGRA. [SEAL]

In presence of—
P. G. KIOCH,
E. V. PENGRA.

STATE OF OREGON, }
County of Marion. } ss.

Be it remembered that on this 15th day of October, A. D. 1874, personally came before me, B. J. Pengra, and C. E. Pengra, his wife, known to me to be the persons described in and who executed the foregoing deed, and acknowledged to me that they executed the same, and the said C. E. Pengra, upon a private examination separate and apart from her husband, acknowledged that she executed the same freely and voluntarily and without fear or compulsion from any one. In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year above written.

[SEAL] PETER G. KOCH,
Notary Public, Marion County, Or.

Recorded Oct. 21, 1874.

JOEL WARE, Co. Clk.

STATE OF OREGON, }
County of Lane. } ss.

I, Joel Ware, county clerk of Lane County, Oregon, hereby certify that I have compared the foregoing transcript with the original deed as recorded in deed book "J," page 382, recorded Oct. 21st, 1874, Lane County records of deeds, and that it is a true, full and complete copy, and the whole thereof of said original.

Witness my hand and official seal this 17 day of August, 1889.

[SEAL] JOEL WARE, Clerk,
By W. R. McCornack, Deputy.

EXHIBIT "N."

This indenture, made and entered into this day of A. D. 187 by and between G. W. Colby and C. A. Colby, his wife, of Butte County, W. H. Parks and Annie W. Parks, his wife, and N. D. Rideout and Phebe M. Rideout, his wife, and W. C. Belcher, of Yuba County, John Boggs and Lou E. Boggs, his wife, of Colusa County, Edgar Mills and Maggie M. Mills, his wife, and Robert Hamilton and Mary Hamilton, his wife, and James Carolan and Emily Carolan, his wife, of Sacramento County Nicholas Lunning, and E. B. Pond and Sarah C. Pond, his wife, and M. P. Jones and Flora D. Jones, his wife, and Isaac Allen, of the city and county of San Francisco, T. B. Simpson and Mary H. Simpson, his wife, and Orrin Gowell and Kate E. Gowell, his wife, and B. F. Baker and Mary B. Baker, his wife, of Oakland in Alameda County, and Isaac Lohman and Fanny E. Lohman, of San Francisco, and J. M. Peck and of San Francisco County, R. F. Parks and Thedera E. Parkes, his wife, of the city and county of San Francisco, all in the State of California, and A. D. Breed and of County, State of , parties of the first part, and the California and Oregon Land Company, a corporation doing business in the State of California and Oregon, and having its principal place of business in the city of San Francisco, State of California, party of the second part.

Witnesseth: That in consideration of one dollar to each of us in hand paid the said parties of the first part have aliened, released, granted, bargained, sold, and by these presents do alien, release, grant, bargain, sell, and convey unto the said party of the second part, its successors and assigns forever, all and singular those certain lands lying and being in the State of Oregon, granted or intended to be granted to the State of Oregon by act of Congress approved July 2nd, 1864, entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene

City to the eastern boundary of said State," and by an act of Congress approved December 26th, 1866, entitled "An act to amend an act entitled an act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," and granted by the State of Oregon to the said Oregon Central Military Road Company by an act of the legislative assembly of said State approved October 24th, 1864, entitled "An act donating certain lands to the Oregon Central Military Road Company," and all the rights, title, and interest acquired by the said Oregon Central Military Road Company to said grant of lands under the several acts aforesaid whether listed and approved or otherwise. And also all the right, title, and interest which may be hereafter acquired by the said parties of the first part or their grantors by virtue of any further compliance with the requirements of said acts or any or either of them by said Oregon Central Military Road Company. Reserving and excepting, however, the lands heretofore sold by said Oregon Central Military Road Company not exceeding seven thousand acres. And also reserving and excepting from this conveyance the right of way grant by said first mentioned act of Congress to the said State of Oregon through the lands of the United States. And also a right of way for one hundred feet in width upon each side of the center line of the traveled road of the said Oregon Central Military Road Company whereof the same runs through or is constructed or located upon the lands granted by said acts of Congress, together with suitable and sufficient grounds to be selected by the said Oregon Central Military Road Company, its successors and assigns, for the purpose of toll houses, depot grounds, water tanks, switches, warehouses, or turnouts for a railroad, should one be constructed over said route. To have and to hold all and singular the lands and premises hereby conveyed, to wit, all of the lands of said grant, whether listed or to be listed to said State of Oregon or to said Oregon Central Military Road Company, and all the right, title and interest of the parties of the first part acquired or to be acquired in the premises hereinbefore described unto the party of the second part, its successors and assigns forever.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year in this indenture first written.

G. W. COLBY.	[Seal]	FLORA D. JONES.	[Seal]
C. A. COLBY.	[Seal]	E. F. BAKER.	[Seal]
W. H. PARKS.	[Seal]	MARY E. BAKER.	[Seal]
ANNIE W. PARKS.	[Seal]	T. B. SIMPSON.	[Seal]
N. D. RIDEOUT.	[Seal]	MARY H. SIMPSON.	[Seal]
PHEBE M. RIDEOUT.	[Seal]	THEODORA E. PARKS.	[Seal]
EDGAR MILLS.	[Seal]	R. F. PARKS.	[Seal]
MAGGIE M. MILLS.	[Seal]	ORRIN GOWELL.	[Seal]
ISAAC ALLEN.	[Seal]	KATE E. GOWELL.	[Seal]
W. C. BELCHER.	[Seal]	JOHN M. PECK.	[Seal]
E. D. POND.	[Seal]	JAMES CAROLAN.	[Seal]
SARAH C. POND.	[Seal]	EMILY CAROLAN.	[Seal]
ISAAC LOHMAN.	[Seal]	NICHOLAS LUYING.	[Seal]
FANNIE E. LOHMAN.	[Seal]	ROBERT HAMILTON.	[Seal]
JOHN BOGGS.	[Seal]	MARY HAMILTON.	[Seal]
M. P. JONES.	[Seal]	LOU E. BOGGS.	[Seal]

STATE OF CALIFORNIA,
City and County of San Francisco. } ss:

On the third day of March, A. D. one thousand eight hundred and seventy-seven, before me, the undersigned, a commissioner of deeds for the State of Oregon, residing in the city and county of San Francisco, California, duly commissioned and sworn, personally appeared Edgar Mills and Maggie M. Mills, his wife, E. D. Pond and Sarah C. Pond, his wife, Isaac Allen, W. C. Belcher, Isaac Lohman and Fannie E. Lohman, his wife, John Boggs, M. P. Jones and Flora D. Jones, his wife, E. F. Baker and Mary E. Baker, his wife, and on the twenty-third day of March, A. D. one thousand eight hundred and eighty-seven, personally appeared T. B. Simpson and Mary H. Simpson, his wife, R. F. Parks and Theodora E. Parks, his wife, Orrin Gowell and Kate E. Gowell, his wife, and on the twenty-seventh day of March, A.D. one thousand eight hundred and seventy-seven, personally appeared John M. Peck, and on the ninth day of

April, A. D. one thousand eight hundred and seventy-seven, personally appeared James M. Carolan and Emily Carolan, his wife, and Nicholas Lunning, personally known to me to be the identical individuals described in and who executed the foregoing instrument, and whose names are subscribed to the foregoing instrument, and they severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned, and the said Maggie M. Mills, wife of the said Edgar Mills, and the said Sarah A. Bond, wife of the said E. B. Pond, and the said Fannie E. Lohman, wife of the said Isaac Lohman, and the said Frora D. Jones, wife of the said M. P. Jones, and the said Mary B. Baker, wife of the said B. F. Baker, and the said Mary H. Simpson, wife of the said F. B. Simpson, and the said Theodora E. Parks, wife of R. F. Parks, aforesaid, and the said Kate E. Gowell, wife of Orrin Gowell aforesaid, and the said Emily Carolan, wife of James W. Carolan aforesaid, upon a private examination, severally separate and apart from their respective husbands aforesaid, each acknowledged to me that she executed the foregoing instrument freely and voluntarily and without fear or compulsion of her husband or of any one.

In witness whereof I have hereunto set my hand and official seal this ninth day of April, A. D. one thousand eight hundred and seventy-seven.

[SEAL] WILLIAM HARNEY,
Commissioner of Deeds for the State of Oregon, residing in San Francisco, California.

STATE OF CALIFORNIA, } ss.
County of Yuba. }

On this 8th day of January, A. D. 1877, before me, L. B. Sellon, a commissioner of deeds for the State of Oregon, residing in Marysville, State of California, duly commissioned and sworn, personally appeared W. H. Parks and Annie W. Parks, his wife, known to me to be the persons whose names are subscribed to the within instrument, and they acknowledged to me that they duly executed the same; and the said Annie W. Parks, wife of the said W. H. Parks, upon a private examination separate and apart from her husband, acknowledged to me that she executed the same

freely and voluntarily and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[SEAL] L. R. SELLON,
Commissioner of Deeds for Oregon, Marysville, California.

STATE OF CALIFORNIA, }
County of Yuba. } ss.

On this 20th day of January, A. D. 1877, before me, L. R. Sellon, a commissioner of deeds for the State of Oregon, residing in Marysville, State of California, duly commissioned and sworn, personally appeared G. W. Colby and C. A. Colby, his wife, known to me to be the persons whose names are subscribed to the within instrument, and they acknowledged to me that they executed the same. And the said C. A. Colby, wife of the said G. W. Colby, upon a private examination separate and apart from her husband, acknowledged to me that she executed the same freely and voluntarily and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[SEAL] L. R. SELLON,
Commissioner of Deeds for Oregon, Marysville, California.

STATE OF CALIFORNIA, }
County of Yuba. } ss.

On this 8th day of January, A. D. 1887, before me, L. R. Sellon, a commissioner of deeds for the State of Oregon, residing in Marysville, State of California, duly commissioned and sworn, personally appeared N. D. Rideout and Phebe M. Rideout, his wife, known to me to be the persons whose names are subscribed to the foregoing instrument, and they acknowledged to me that they duly executed the same. And the said Phebe M. Rideout, wife of the said N. D. Rideout, upon a private examination separate and apart from her husband, acknowledged to me that she executed the same freely and voluntarily and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[SEAL] L. R. SELLON,
Commissioner of Deeds for Oregon, Marysville, California.

STATE OF CALIFORNIA, }
County of Sacramento. } ss.

On this eleventh day of April, A. D. 1877, before me, Edward Cadwalader, a commissioner of deeds for the State of Oregon, residing in Sacramento, State of California, duly commissioned and sworn, personally appeared Robt. Hamilton and Mary Hamilton, his wife, known to me to be the persons whose names are subscribed to the within instrument, and they acknowledged to me that they duly executed the same. And the said Mary Hamilton, wife of the said Robt. Hamilton, upon a private examination separate and apart from her husband, acknowledged to me that she executed the same freely and voluntarily and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

[SEAL] EDW. CADWALADER,
Commissioner of Deeds for Oregon, Sacramento, California.

STATE OF OREGON, }
City and County of San Francisco. } ss.

On this twenty-seventh day of April, A. D. 1877, before me, the undersigned, a commissioner of deeds for the State of Oregon, residing in San Francisco, California, duly commissioned and sworn, personally appeared Lou E. Boggs, wife of John Boggs, known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said Lou E. Boggs, wife of the said John Boggs, on a private examination separate and apart from her husband, acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and official seal this twenty-seventh day of April, A. D. 1877.

[SEAL] WILLIAM HARNEY,
Commissioner of Deeds for the State of Oregon, residing in San Francisco, California.

STATE OF OREGON,
County of Lane. } ss.

I hereby certify that the foregoing deed was duly recorded by me in Lane County record of deeds, Vol. L, page 263, on the 24th day of Nov., 1877.

[SEAL] JOEL WALE,
Clerk of Lane County, Oregon.

STATE OF OREGON,
County of Lake. } ss.

I hereby certify that the foregoing deed was duly recorded by me in Lake County record of deeds, Vol. 1st, pages 239, 240, & 241, on the 22nd day of December, 1877.

B. F. HATTON,
Clerk of Lake County, Oregon.

Recd. for record, Mar. 1st, 1878, at 2 o'clock p. m.

STATE OF OREGON,
County of Grant. } ss.

I, Phil Metschan, county clerk for Grant County, State of Oregon, and ex officio clerk of the circuit court for said county and State, do hereby certify that the foregoing transcript of deed from G. W. Colby et al. to the California and Oregon Land Company, recorded Vol. "G," on pages 103 to 108, record of deeds for Grant County, Oregon, Mar. 1st, 1878, at 2 o'clock p. m., has been by me compared with the original and that it is a true and correct copy of said original deed and of the whole thereof as the same appears of record in my office and custody.

Witness my hand and seal of the said court this 16th day of Aug., 1889.

[SEAL] PHIL METSCHAN, Clerk.
By J. D. Sutherland, Deputy Clerk.

And afterwards, to wit, on the 30th day of August, 1889, there was issued out of said court a subpœna ad respondendum in words and figures as follows, to wit:

DISTRICT OF OREGON, ss:

I certify that on the 12th day of Oct., 1889, at Eugene, in Lane County, in said district, I duly served the within subpœna ad respondendum upon the therein-named B. J. Pengra, by exhibiting said subpœna to him, and by delivering to him personally a true copy of said subpœna duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled cause, duly certified to by the clerk of the circuit court for said district.

JOHN MYERS,
United States Marshal.
By W. W. Cochran, Deputy.

DISTRICT OF OREGON, ss:

I certify that on the 20th day of September, 1889, at Springfield, Lane County, in said district, I duly served the within summons upon the therein-named C. E. Pengra, by delivering to her personally a true copy of said summons, duly certified to by me as U. S. marshal.

JOHN MYERS,
United States Marshal.
By H. C. Myers, Deputy.

DISTRICT OF OREGON, ss:

I certify that on the 2d day of Sept., 1889, at Portland, Multnomah County, in said district, I duly served the within summons upon the therein-named Oregon Central Military Road Co., by delivering to J. M. Drake, secretary, personally, a true copy of said summons duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the U. S. circuit court for said district.

JOHN MYERS,
United States Marshal.
By C. N. Wait, Deputy.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES, COMPLAINANT,

vs.

THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. PENGRA, C. E. PENGRA, G. W. COLBY, JOHN BOGGS, N. D. RIDEOUT, W. H. PARKS, R. F. PARKS, EDGAR MILLS, E. B. POND, NICHOLAS LUNNING, W. C. BELCHER, F. B. SIMPSON, J. W. PECK, ISAAC ALLEN, B. F. BAKER, M. P. JONES, D. H. HOLBROOK, ISAAC LOHMAN, A. D. BREED, AND THE CALIFORNIA AND OREGON LAND COMPANY, DEFENDANTS.

No. 1632. In equity.

Subpœna ad respondendum.

The President of the United States of America to the Oregon Central Military Road Company, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company, greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of October next, which will be the 7th day of October, A.D. 1889, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein the United States is complainant and you are defendants, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the honorable Melville W. Fuller, Chief-Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 30th day of August, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and ——

{Seal of the U. S. Circuit Court, District of Oregon.} R. H. LAMSON, Clerk.

By R. B. Lamson, Deputy Clerk.

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States:

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

(Indorsed:) No. 1632. In the circuit court of the United States for the district of Oregon. In equity. The United States vs. Oregon Central Military Road Co. *et al.* *Subpœna ad respondendum.* (Endorsed:) Returned and filed April 17, 1890. R. H. Lamson, clerk. By R. B. Lamson, deputy clerk.

And afterwards, to wit, on the 17th day of September, 1889, there was duly filed in said court a præcipe for appearance of defendants in words and figures as follows, to wit:

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES, *vs.* OREGON CENTRAL MILITARY ROAD CO. ET AL. } No. 1632.

To the clerk of the above-entitled court:

You will please enter our appearance as solicitors in the above-entitled cause for the defendants, except B. J. Pengra, C. E. Pengra, and the Oregon Central Military Road Company.

DOLPH, BELLINGER, MALLORY & SIMON,
By C. E. S. Wood,
Of Counsel.

(Indorsed:) No. 1632. In the circuit court of the United States for the district of Oregon. The United States vs. Oregon Central Military Road Co. *et al.* Præcipe for appearance of defendants. Filed and entered Sept. 19, 1889. R. H. Lamson, clerk. By D. W. Stevens, deputy.

And afterwards, to wit, on the 17th day of September, 1889, there was duly filed in said court a petition for leave to file double pleas in words and figures as follows, to wit:

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES, COMPLAINANT,
vs.
E. B. POND ET AL., DEFENDANTS.

Your petitioner, the defendant E. B. Pond, for himself and others of like equity, showeth that the complainant having exhibited its bill in the honorable court against your petitioner, and your petitioner having entered their appearance in the above-entitled suit, your petitioner is now advised that it will be inconvenient and against equity and the full administration of justice to be required to plead singly in this suit; that there are several distinct and separate defenses to the entire subject-matter of the bill, which defenses do not involve the expense, trouble, and delay of making issue on the actual construction of the road and taking testimony in such issue, and your petitioner showeth that he ought to be allowed to enter more than one plea to this bill. Wherefore your petitioner prays for an order allowing him to plead more than one plea to the bill filed herein, to wit:

1. Bona fide purchase.
2. Delays, laches, and estoppel against equity.
3. Effect of the governor's certificates.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for the Def'ts.

(Endorsed:) Filed Sept. 17th, 1889.
R. H. LAMSON, clerk.
By D. W. Stevens, deputy.

And afterwards, to wit, on the 2d day of October, 1889, there was duly filed in said court exceptions of defendants

N. D. Rideout et al. to bill in words and figures as follows, to wit:

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE OREGON CENTRAL MILITARY ROAD Company and others, defendants.

Exceptions taken by N. D. Rideout, Edgar Mills, E. B. Pond, Nicholas Lenning, W. C. Belcher, J. W. Peck, B. F. Baker, M. P. Jones, Isaac Lohman, and the California & Oregon Land Company, defendants herein, to the bill of complaint of the plaintiff.

These defendants except to all the parts of said bill herein described as being matters not material to said suit, and which cannot aid the plaintiff in obtaining the relief sought by said bill, and pray that they may be expunged, with costs, to wit:

First exception:

For that said bill is impertinent from and after the word "effect," in the third line of the third paragraph thereof, to the end of said paragraph.

Second exception:

For that said bill is impertinent from and after the word "same," in the fourth line of the thirteenth paragraph thereof, to the end of said paragraph.

Third exception:

For that the said bill is impertinent in the twenty-first paragraph by containing the words "and maintained," in the ninth line thereof, and the words "or maintained," in the eighteenth and nineteenth lines thereof, and the words "or maintained," in the twenty-first line thereof.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Defendants above named.

[Endorsed:] Filed Oct. 2, 1889.

R. H. LAMSON, Clerk.

And afterwards, to wit: on Monday, the 7th day of October, 1889, the same being the 1st judicial day of the regular October term of said Court. Present, the honorable Lorenzo Sawyer, United States circuit judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the ninth judicial district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY WAGON ROAD COMPANY *et al.* } No. 1632.

OCTOBER 7th, 1889.

This cause was heard upon the motion of certain of the defendants for leave to file more than one plea to the bill, and upon the exceptions of the defendants N. D. Rideout, Edgar Mills, E. B. Pond, Nicholas Lenning, W. C. Belcher, J. W. Peck, B. F. Baker, M. P. Jones, Isaac Lohman, and the California and Oregon Land Company to said bill for impertinance, and was argued by Mr. Lewis L. McArthur, United States attorney, and Mr. William Carey Johnson, special assistant United States attorney, for the plaintiff, and by Mr. Cyrus A. Dolph and Mr. Charles B. Bellinger, of counsel for said defendants; on consideration whereof it is ordered that said motion be, and the same is hereby, allowed, and that said exceptions be, and the same are hereby, sustained.

And afterwards, to wit, on the 24th day of October, 1889, there was duly filed in said court a plea and answer of defendant California & Oregon Land Co. in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lochman, A. D. Breed, and The California and Oregon Land Company, defendants.

The plea and answer of the defendant, The California and Oregon Land Company.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for plea to the whole of the said bill or to so much and such part of the said bill as prays that the land granted to the State of Oregon by the act of Congress on the 2d day of July, 1864, and the act amendatory thereof passed on the 26th day of December, 1866, and now owned by this defendant, The California and Oregon Land Company, be decreed forfeited to the United States and restored to the public domain says, that on October 24th, 1864, the legislature of Oregon granted to the defendant, The Oregon Central Military Road Company, all land, right of way, rights, privileges, and immunities granted to the said State of Oregon by said act of Congress of July 2nd, 1864, together with all such lands, rights, privileges, and immunities as might thereafter be granted to said State to aid in the construction of the said road mentioned and provided for in said act of Congress.

That on July 27th, 1866, the governor of Oregon duly certified that in accordance with said act of Congress of October 24th, 1864, and with said act of the legislature of Oregon, he had passed over and carefully examined the first fifty miles of the Oregon Central Military Road Company's road, beginning at Eugene City and extending eastward and

towards the southern or eastern boundary of the State of Oregon, and that the first continuous fifty miles of said road, beginning at Eugene City, were completed in accordance with the requirements of said act of Congress and the laws of Oregon.

That on November 26th, 1867, the governor of Oregon duly certified that the section of said military road extending from the point to which it had already been approved, as hereinbefore stated, thence to Crescent Lake in the valley of the Deschutes, being forty-two and one-half miles, more or less, having been carefully inspected and found to be well and faithfully built and fully up to the requirements of the law, and that he had therefore approved and received the same.

That on the 12th day of January, 1870, the governor of Oregon duly certified that said military road had been completed as required by said act of Congress, and the said act of the legislature of Oregon from Eugene City, Oregon, to the eastern boundary of the State.

That each of said several certificates was made honestly and in good faith and without any fraudulent intent or procurement or false representation by any person whomsoever.

That the said grant of lands and all rights and interests thereunder were by sundry mesne conveyances since said last mentioned date, conveyed and transferred to and vested in this defendant, the California and Oregon Land Company, and that said defendant company has since been and is now the owner in fee of all the lands granted by said act of Congress, save only as to a portion of said lands heretofore conveyed by said defendant and its grantors.

And for a further and second plea to the whole of the said bill, this defendant, the California and Oregon Land Company says: That on October 24th, 1864, the legislature of Oregon granted to the defendant, The Oregon Central Military Road Company, all lands, rights of way, rights, privileges and immunities granted to the said State of Oregon by said act of Congress of July 2nd, 1864, together with all such lands, rights, privileges and immunities as might thereafter be granted to said State to aid in the construction of the said road mentioned and provided for in said act of Congress.

That on July 27th, 1866, the governor of Oregon duly certified that in accordance with said act of Congress of October 24th, 1864, and with said act of the legislature of Oregon, he had passed over and carefully examined the first fifty miles of the Oregon Central Military Road Company's road beginning at Eugene City and extending eastward and towards the southern or eastern boundary of the State of Oregon, and that the first continuous fifty miles of said road beginning at Eugene City were completed in accordance with the requirements of said act of Congress and of the laws of Oregon.

That on November 26th, 1867, the governor of Oregon duly certified that the section of said military road extending from the point to which it had already been approved as hereinbefore stated, thence to Crescent Lake in the valley of the Deschutes, being forty-two and one-half miles, more or less, having been carefully inspected and found to be well and faithfully built and fully up to the requirements of the law, and that he had therefore approved and received the same.

That on the 12th day of January, 1870, the governor of Oregon duly certified that said military road had been completed as required by said act of Congress and the said act of the legislature of Oregon, from Eugene City, Oregon, to the eastern boundary of the State.

That the Commissioner of the General Land Office, and the Secretary of the Interior, did on the following several dates, to wit: November 13th, 1867, April 21st, 1871, December 8th, 1871, and April 2nd, 1873, execute and deliver to the State of Oregon in pursuance of the said acts of Congress and on account of said road, certified lists of certain of the lands "in place" granted to the State in aid of the construction of said road, which lists embrace an aggregate of above $361,327\frac{43}{100}$ acres of such grant.

That on about the 15th day of May, 1874, the defendants G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lenning, W. C. Belcher, F. B. Simpson, J. M. Peck, Isaac Allen, B. F. Baker, M. P. Jones, and Isaac Lohman, then residents of the State of California, placing confidence in the truth of

the hereinbefore mentioned certificates of the governor of Oregon, that the said road had been duly and seasonably constructed and completed in accordance with the terms of the said granting acts, and also in the said certified lists did purchase in good faith, and for a valuable consideration, to wit: for the sum of $200,000 from the defendants, B. J. and C. E. Pengra, all the said lands granted in said act of Congress, that said B. J. Pengra claimed at the time to be the owner of said lands by virtue of the deeds to him from the Oregon Central Military Road Company of date respectively May 12th, and October 12th, 1874, which deeds are described in paragraph 18 of the bill of complaint herein and of which the exhibits I and J attached to said bill are copies, that said company at the time of said conveyances was the owner of said grant by grant from the State of Oregon as set forth in said bill.

And this defendant avers that said sum of $200,000 was paid by said defendants in money, truly and bona fide, and without notice previous thereto, or to the delivery of the conveyances thereof, or of any of the pretended fraudulent representations or acts in the bill of complaint set forth, and without any reason to believe or suspect that there had been any fraudulent act or misrepresentation in the examination or certifying the completion of said road, or any part thereof, or that said road had not been wholly, seasonably, and properly completed in accordance with the requirements of said granting acts.

And this defendant says that said purchasers were the promoters, organizers, and original stock subscribers and holders of the defendant, the California and Oregon Land Company; that said company is duly incorporated under the laws of the State of California for the purpose of taking said land grant, and as a convenient means of managing the property and interests of the said several purchasers in said land grant, and to this end said several purchasers did on March 3rd, 1871, convey to said company their several interests in said grant in consideration of the interest and stock in the said corporation severally held by them; that at the time of the said transfer and conveyance to said corporation, neither the said company nor any of its

officers, or agents, or stockholders, had any notice or reason to believe or suspect that there had been any fraud or misrepresentation, or failure of duty in the examination or certifying aforesaid, but the transfer to and the taking by said company was had and done really, bona fide, and upon the confidence placed by them and each of them in the truth of the said certificates.

That so confiding and relying and without notice or reason to believe or suspect any of the alleged fraudulent acts or misrepresentations in the bill of complaint charged, the said promoters and the said land company have really and bona fide paid in the care and expense attending said lands the sum of $87,775.10, and in addition thereto have paid in taxes levied under the laws of Oregon the sum of $39,362.12. That there has not been received by said company, or by its stockholders on account of said lands, to exceed the sum of $14,304.64, which sum has been derived from sales and rents of lands thereof. That since the conveyance of said grant and lands to said California and Oregon Land Company, there have been from time to time sales and transfers of the stock of said company to others than its original stockholders, who are now the owners and holders of such stock, and so were at the commencement of this suit; that such purchases have been made by such holders, in the confidence reposed by them in the truth of the said certificates and in reliance upon the said hereinbefore mentioned listing of lands and upon the said act of Congress approved June 18th, 1874, and cited in the 16th paragraph of the bill of complaint herein; that various sums per share up to $20 per share were really and bona fide paid by such purchasers for such stock, without notice by them, or reason to believe or suspect any of the alleged fraudulent acts or misrepresentations in the said bill charged; that said company's capital stock consists of twenty thousand shares which is, and at the beginning of this suit was, held by twenty-five stockholders, of whom only eight were originally stockholders in said company, or are defendants in this suit.

All which matters and things this defendant does aver to be true, and it pleads the said matters in bar to the plain-

tiff's bill of complaint, and prays the judgment of this honorable court whether it ought to be required to make any other or further answer to said bill and prays to be hence dismissed with its costs and charges in that behalf wrongfully sustained.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for the Defendant, the California and Oregon Land Co.

CALIFORNIA AND OREGON LAND COMPANY,
{Corporate seal.} By E. B. Pond, President,
and Abraham Halsey, Secretary.

STATE OF CALIFORNIA,
County of San Francisco. } ss.

The plea of the defendant, the California and Oregon Land Company, was taken this 17 day of October, 1889, before me, under the common seal of the said corporation, as by its said seal thereto attached appears.

[SEAL.] J. D. MONCKTON,
Deputy Clerk & Commissioner U. S. Circuit Court, Northern District of California.

DISTRICT OF OREGON, ss:

I, C. B. Bellinger, hereby certify that I am one of the solicitors for the defendant, the California and Oregon Land Company, in the foregoing entitled suit, and that in my opinion the foregoing pleas are well founded in point of law.

C. B. BELLINGER.

STATE OF CALIFORNIA,
County of San Francisco. } ss.

I, E. B. Pond, being first duly sworn, do depose and say that I am the president of the California and Oregon Land Company, defendant in the above suit; that the foregoing pleas are true in point of fact, and that the same are not interposed for delay.

E. B. POND.

Subscribed and sworn to before me this 17th day of October, 1889.

[SEAL.] F. D. MONCKTON,
Deputy Clerk and Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed:) Filed Oct. 24, 1889.

R. H. LAMSON, Clerk,

And afterwards, to wit, on the 24th day of October, 1889, there was duly filed in said court an answer of defendant, California & Oregon Land Co., in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, PLAINTIFF,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and The California and Oregon Land Company, defendants.

To the honorable the judges of the circuit court of the United States for the district of Oregon:

The answer of the California and Oregon Land Company to the bill of complaint of the United States, complainant, accompanying the pleas of this defendant and fortifying the same, and not waiving the said pleas.

This defendant now, and at all times hereafter, saving to itself all and all manner of exceptions or otherwise that may or can be taken to the many errors, uncertainties, and imperfections in the said plaintiff's bill contained, for answer thereto or to so much thereof as this defendant is advised it is necessary or material for it to make answer to, answering says:

In answer to the first paragraph of the said bill, this defendant admits that all the allegations therein contained are true.

In answer to the second paragraph of the said bill, this defendant admits that all the allegations therein contained are true.

In answer to the third paragraph of the said bill, this defendant admits that all the allegations therein contained are true.

In answer to the fourth paragraph of the said bill, this defendant admits that all the allegations therein contained are true.

In answer to the fifth paragraph of the said bill, this defendant admits that the governor of Oregon, on the 27th day of July, 1866, made and issued the certificate set forth in said paragraph; but it says it has no knowledge or information concerning the other matters alleged and contained in said paragraph, but it believes that neither the officers, stockholders, or agents of the Oregon Central Military Road Company, nor any one of them, nor any other persons or person, acting in the interest of said company, or of any such officers, stockholders, or agents, or of either of them, on the said 27th day of July, 1866, or at any other time, falsely or fraudulently represented to Addison C. Gibbs, then governor of Oregon, or to any other person, that said road had been constructed for fifty miles, or for any distance, from Eugene City eastward, or from any other point or in any direction, as required by law, nor that they, the said officers, stockholders, agents, or representatives, or other persons, or any one or more of them, then, or at any time, knew that any such representations were false, or that said road had not in any respect been constructed according to law, nor that they, or any of them, made said alleged false and fraudulent representations, or any representations, or so did for the purpose of procuring the issuance of such certificate, or for any purpose.

And this defendant believes that no such false or fraudulent representations were ever made by any of the said officers, stockholders, agents, or representatives of said company, or by any persons or person in its behalf, and that no representations of any kind were made by any one on behalf of said company for the purpose of procuring the issuing of said certificate by the governor.

And this defendant denies that said certificate was issued through any false or fraudulent representations by the officers, stockholders, agents, or representatives of said company, or of any of them, or of any person in its behalf, as alleged in said fifth paragraph of said bill of complaint.

In answer to paragraph six of said bill this defendant denies the allegations therein contained, and it denies that said Oregon Central Military Road Company, or that its officers, agents, or representatives, or that any one in its behalf, fraudulently or otherwise, pointed out to said governor any county road or led him to believe that any county road was owned or had been constructed by said company, and it says that the said Oregon Central Military Road Company had on and prior to the 27th day of July, 1866, constructed the fifty miles of road mentioned in the said certificate of the governor of Oregon, in all respects according to the requirements of the said act of Congress, which fact Addison C. Gibbs, then governor of Oregon, ascertained and knew from an examination of the same by him made, and by proof thereof to his satisfaction.

In answer to the seventh paragraph of said bill of complaint, this defendant admits that the governor of Oregon, on the 26th day of November, 1867, made and issued the certificate set forth in said paragraph; but it says it has no knowledge or information concerning the other matters alleged and contained in said paragraph, but it believes that neither the officers, stockholders, or agents of the Oregon Central Military Road Company, nor any one of them, nor any other persons or person acting in the interest of said company, or of any such officers, stockholders, or agents, or of either of them, on the said 26th day of November, 1867, or at any other time, falsely or fraudulently represented to George L. Woods, then governor of Oregon, or to any other person, that said road had been constructed forty-two and one-half miles, or for any distance, from Eugene City eastward, or from any other point or in any direction, as required by law, nor that they, the said officers, stockholders, agents, or representatives, or other person, or any one of them, then or at any time knew that any such representations were false, or that said road had not in any respect

been constructed according to law, nor that they or any of them made said alleged false and fraudulent representations, or so did for the purpose of procuring the issuance of such certificate.

And this defendant believes that no such false or fraudulent representations were ever made by any of the said officers, stockholders, agents, or representatives of said company, or by any persons or person in its behalf.

And this defendant denies that said certificate was issued through any false or fraudulent representations by the officers, stockholders, agents, or representatives of said company, or of either of them, or of any person in its or their behalf.

In answer to the eighth paragraph of said bill of complaint, this defendant denies the allegations therein contained, and it says that the Oregon Central Military Road Company had on November 26th, 1867, constructed forty-two and one-half miles of road in all respects as required by said act of Congress, which fact the said George L. Woods, then governor of Oregon, then and there well knew from an examination and inspection by him made and from proof thereof to his satisfaction.

In answer to paragraph nine of said bill of complaint, this defendant denies that said certificate issued as aforesaid by the governor on November 26th, 1867, was procured by the said road company by or through any false or fraudulent representations by the officers, stockholders, agents, or representatives thereof, or of any of them, or of any person or persons, and it believes that no representations were at any time made by any person or persons in behalf of said company, or otherwise, in order to enable it falsely or fraudulently to obtain possession or control of the lands, or of any of them, lying within the limits of said grant, or that the acceptance of said road by the governor was a fraud upon the United States. On the contrary, this defendant says that said road was constructed in all respects as required by law, and was fairly and in good faith accepted by the governor of the State of Oregon.

In answer to the tenth paragraph of said bill of complaint, this defendant admits that the governor of Oregon on the

12th day of January, 1870, made and issued the certificate in said paragraph set forth, and it says it has no knowledge or information concerning the other matters in said paragraph alleged, but it believes that neither the officers, stockholders, or agents of the Oregon Central Military Road Company, nor any one of them, nor any other person acting in his or their interest, or in the interest of said company, on the said 12th day of January, 1870, or at any other time, falsely or fraudulently represented to George L. Woods, then Governor of Oregon, or to any other person, that said road had been constructed as required by law or presented a map falsely showing the same, or the route thereof, nor that they, the said officers, stockholders, agents, or representatives, or any one of them, or other person, then or at any time knew that any such representations were false, or that said road had not been constructed in any respect as required by law, nor that they or any of them made said alleged false and fraudulent representations, or so did for the purpose of procuring the issuance of such certificate. And this defendant believes that no such false or fraudulent representations were ever made by any of the said officers, stockholders, agents, or representatives of said company, or by any person in its or their behalf.

In answer to paragraph eleven of said bill of complaint, this defendant denies the allegations therein contained, and it says that the Oregon Central Military Road Company had on said January 12th, 1870, constructed a road in all respects as required by said act of Congress within the limits of said grant, from Eugene City to the eastern boundary of the State of Oregon, which fact the said George L. Woods, then governor of Oregon, well knew from an examination and inspection by him made and from proof thereof to his satisfaction.

In answer to paragraph twelve of said bill of complaint this defendant denies that any of said certificates were procured by said Military Road Company through any false or fraudulent representations by any of its officers, stockholders, agents, or any other person, and it believes that no such representations were at any time made or were so made to enable said company to falsely or fraudulently obtain

possession or control of any of the lands of said grant, or that the acceptance of said road by the governor of Oregon was a fraud upon the United States. On the contrary, this defendant says that said road was constructed in all respects as required by said act of Congress, and was fairly and in good faith accepted by the governor of Oregon.

In answer to paragraph thirteen of said bill of complaint, this defendant says that the said road was graded, bridged, cleared, and constructed in whole through its entire length, so as to be a public highway, and so as to permit of its regular use as a wagon road, and so as to permit the transportation of property, troops, and mails of the United States over them.

In answer to paragraph fourteen of said bill of complaint, this defendant says that in the construction of the said road by the said Oregon Central Military Road Company, there was expended by that company about $130,000.00, and that the lands granted to said company were disposed of by it to re-imburse it for such expenditure.

In answer to paragraph fifteen of said bill of complaint, this defendant says that the lands granted by Congress were disposed of by the State to the said Military Road Company for the purposes expressed in said act of Congress, and have been applied to re-imburse said company for the expenditure made by it in the construction of said road.

In answer to paragraph sixteen of said bill of complaint, this defendant says the statements therein contained are true.

In answer to paragraph seventeen of said bill of complaint, this defendant says that it is true that the Commissioner of the General Land Office and the Secretary of the Interior did on the several dates in said paragraph mentioned execute and deliver to the State of Oregon, for the benefit of said road, certified lists of land as in said paragraph alleged, and it believes the number of acres so certified to be correctly stated in the exhibits attached to the bill of complaint. But this defendant denies that said Commissioner or said Secretary was deceived, misled or imposed upon by any false or fraudulent certificates, or was otherwise deceived, misled, or imposed upon in the execution and delivery of

the said certified lists of land to the State of Oregon, and this defendant says that said certificates were so issued and delivered properly and fairly. And this defendant admits that the President of the United States did, as alleged in said paragraph, issue to the Oregon Central Military Road Company patent or patents for the number of acres therein mentioned; but it denies that he was deceived, misled or imposed upon in so doing by any false or fraudulent certificates or otherwise, and it says that said patents were properly and fairly issued.

In answer to paragraph eighteen of said bill of complaint, this defendant admits the execution and delivery of the several conveyances and transfers therein mentioned, and it says that said grant and all rights and interests thereunder have passed by such conveyances and are now held by and vested in the defendant, the California and Oregon Land Company, except as to about one thousand acres heretofore sold and conveyed by said company.

In answer to paragraph nineteen of said bill of complaint this defendant admits the matters therein stated to be true.

In answer to paragraph twenty of said bill of complaint, this defendant says it believes that the maps or plats referred to in the certificate hereinbefore mentioned show the line of said road, the aggregate amount of land included in said grant, the number of acres which have been in effect patented, and the number of acres for which said company claims the right to have patents issue as stated in said paragraph, but denies that the claim of said company to have of right a patent issue for the lands so claimed is questionable, and it says that it has good right in equity to such patent.

In answer to paragraph twenty-one of said bill of complaint, this defendant says that neither of the defendants nor any of its officers, stockholders, or agents, at the time of the execution and delivery of the said deeds, or at the time of the execution of any of such deeds, or at the time of the accruing of any of their interests in said land, or at any time, had any knowledge that the road provided for in said act of Congress had not been constructed as required by said act,

or so as to be in every sense a public highway, or so that it could be used by the United States, or by any of the citizens or residents thereof as a public highway, or so that the United States could transport its property, troops, or mails over the same, and it says that neither of them had at any of such times, or at any time, any knowledge that no grades had been established or constructed upon any part of said road, or that no clearing had been done on any part thereof, or that no bridge or bridges had been built or ferries established over any stream on the line thereof, or that no cuts or turnouts had been constructed at every proper place on said line of road; that neither of them had at any time any knowledge that said road was not begun and completed within five years from the date of the passage of said act of Congress, or that it had never been begun or constructed. That neither of them at any time knew that any of the statements made in any of the said certificates of the said governor of Oregon were false, or that either of said governors did not examine the road and every part thereof referred to in such certificates, or that either of said certificates had been procured by false or fraudulent representations, or that either of said patents were procured upon any false certificates; on the contrary, this defendant and its several stockholders believe, and so believed at the time it acquired said lands, that said road had in all respects been constructed within the time and in the manner required by the act of Congress, and that said certificates were in all respects true.

And this defendant further answering the matters in said bill of complaint alleged says: That on about the 15th day of May, 1874, the defendants, C. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lenning, W. C. Belcher, F. B. Simpson, J. M. Peck, Isaac Allen, B. F. Baker, M. P. Jones, and Isaac Lohman, then residents of the State of California, placing confidence in the truth of the hereinbefore mentioned certificates of the governor of Oregon that the said road had been duly and seasonably constructed and completed in accordance with the terms of the said granting acts, and also in the said several certificates of the Commis-

sioner of the General Land Office and Secretary of the Interior, did purchase in good faith and for a valuable consideration, to wit, for the sum of $200,000, from the defendants, B. J. and C. E. Pengra, who had succeeded to the ownership of the said grant of lands, through the act of the legislature of Oregon, and the conveyances, assignments, and transfers of said Oregon Central Military Road Company, as stated in the bill of complaint herein.

And this defendant avers that said sum of $200,000 was paid by said defendants in money, truly and bona fide, and without notice previous thereto or to the delivery of the conveyances thereof of any of the pretended fraudulent representations or acts in the bill of complaint set forth, and without any reason to believe or suspect that there had been any fraudulent act or misrepresentation or failure of duty in the examination or certifying the completion of said road or of any part thereof, or that said road had not been wholly, seasonably, and properly completed in accordance with the requirements of said granting acts.

And this defendant says that said purchasers were the promoters, organizers, and original stock subscribers and holders of the defendant, the California and Oregon Land Company; that said company is duly incorporated under the laws of the State of California, for the purpose of taking said land grant, and as a convenient means of managing the property and interests of the said several purchasers in said land grant, and to this end said several purchasers did, on March 3rd, 1871, convey to said company their several interests in said grant in consideration of the interest and stock in the said corporation severally held by them; that at the time of the said transfer and conveyance to said corporation neither the said company nor any of its officers or agents or stockholders had any notice or reason to believe or suspect that there had been any fraud or misrepresentation or failure of duty in the examination or certifying aforesaid, but the transfer to and the taking by said company was had and done really, bona fide, and upon the confidence placed by them and each of them in the truth of the said certificates.

That so confiding and relying, and without notice or rea-

son to believe or suspect any of the alleged fraudulent acts or misrepresentations in the bill of complaint charged, the said promoters and the said land company have really and bona fide paid in the care and expense attending said lands the sum of $87,775.10, and in addition thereto have paid in taxes, levied under the laws of Oregon, the sum of $39,-362.12.

That there has not been received by said company or by its stockholders, on account of said lands, to exceed the sum of $14,504.64, which sum has been derived from rents and sales thereof.

That since the conveyance of said grant and lands to said California and Oregon Land Company there have been from time to time sales and transfers of the stock of said company to others than its original stockholders, who are now the owners and holders of such stock, and so were at the commencement of this suit. That such purchases have been made by such holders in the confidence reposed by them in the truth of the said certificates, and in reliance upon the said hereinbefore-mentioned listing of lands and upon the said act of Congress approved June 18th, 1874, and cited in the 16th paragraph of the bill of complaint herein; that various sums per share up to $20 per share were really and bona fide paid by such purch'ers for such stock without notice by them or reason to believe or suspect any of the alleged fraudulent acts or misrepresentations in the said bill charged; that said company's capital stock consists of twenty thousand shares, which is and at the beginning of this suit was held by twenty-five stockholders, of whom only eight were originally stockholders in said company or are defendants in this suit.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and

willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for the Deft., the Cal. & Oregon Land Company.

CALIFORNIA AND OREGON LAND COMPANY,
{Corporate seal.} By E. B. POND, President,
and Abraham Halsey, Secretary.

STATE OF CALIFORNIA,
County of San Francisco. } ss.

The answer of the defendant, The California and Oregon Land Company, was taken this 17 day of October, 1889, before me under the common seal of the said corporation, as by its said seal affixed appears.

[SEAL.] J. D. MONCKTON,
Deputy Clerk & Commissioner U. S. Circuit Court, Northern District of California.

STATE OF CALIFORNIA,
County of San Francisco. } ss.

On this 17 day of October, 1889, personally appeared E. B. Pond, president of the defendant, The California and Oregon Land Company, and made oath that he is the president of said company and is familiar with its business affairs; that he has heard the foregoing answer read and knows the contents thereof, and that the matters and things set forth therein so far as it relates to the acts of the said defendant are true, and so far as it relates to the acts of others, he believes the same to be true.

E. B. POND.

Subscribed and sworn to before me this 17th day of October, 1889.

[SEAL] J. D. MONCKTON,
Deputy Clerk & Commissioner U. S. Circuit Court, Northern District of California.

(Endorsed:) Filed Oct. 24, 1889.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Tuesday, the 18th day of February, 1890, the same being the 87th judicial day of the

regular October term of said court; present, the honorable George M. Sabin, United States district judge of Nevada, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY WAGON Road Company et al. } No. 1632.

February 18th, 1890.

This cause was heard upon the pleas of the defendants filed to the bill of complaint herein, and was argued by Mr. Lewis L. McArthur, United States attorney, and by Mr. Charles B. Bellinger and Mr. Rufus Mallory, of counsel for the defendants. On consideration whereof, it is now here ordered, adjudged, and decreed that said pleas be and the same are hereby sustained, and that said bill of complaint be and the same is hereby dismissed.

GEO. M. SABIN, Judge.

(Endorsed:) Filed Feby. 18, 1890.

R. H. LAMSON, clerk.

And afterwards, to wit, on the 18th day of February, 1890, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

In the circuit court of the United States, ninth judicial circuit, district of Oregon.

UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company.

OPINION OF THE COURT.

Tuesday, February 18, 1890.

This case, in nearly all respects, is similar to that just decided—United States vs. The Dalles Military Wagon Road Company. The principal difference between the cases consists in the fact that in this case the certificates of the governor of completion are made on the completion of each section of fifty miles, and the act authorized the sale of

thirty sections of the land before any work was done, and of thirty more upon the certificate of the governor of the completion of each ten miles of the road till the whole should be completed. The first certificate that fifty miles had been completed was made by Governor Gibbs, and the subsequent certificates by Governor Woods, who made the certificates in the other case. So, also, in this case, the governor is not charged with acting fraudulently in issuing the certificates, as he was in the other. If this case, as is contended on this account, is brought within the decision of the U. S. vs. Flint, U. S. vs. Throckmorton, and U. S. vs. Carpentier, 4 Sawyer, 42, and the same cases affirmed on appeal, 98 U. S., 68, it stands in a stronger position than the other, for in that view, since the officer to determine the question was no participant in the fraud, his decision is conclusive, and unassailable even in equity. However the rule may be as applicable to this case, the pleas must be held sufficient and the bill dismissed for the reasons stated in the case of the United States vs. The Dalles Military Wagon Road Company, and it is so ordered.

SAWYER, Circuit Judge.

(Endorsed:) Filed Feb'y 18, 1890.

R. H. LAMSON, clerk.

And afterwards, to wit, on Friday, the 21st day of February, 1890, the same being the 90th judicial day of the regular October term of said court, present, the Honorable George M. Sabin, United States district judge of Nevada, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY WAGON ROAD COMPANY et al. } No. 1632.

February 21, 1890.

Now, at this day, on motion of Mr. Franklin P. Mays, United States attorney, it is ordered that an appeal in this cause to the Supreme Court of the United States be, and the same is hereby, allowed.

And afterwards, to wit, on the 8th day of June, 1891, there was duly filed in said Court, a mandate from Supreme Court in words and figures as follows, to wit:

UNITED STATES OF AMERICA—SS.

The President of the United States of America.

[Seal of the U. S. Supreme Court]

To the Honorable the Judges of the Circuit Court of the United States for the District of Oregon.

Greeting:

Whereas, lately in the Circuit Court of the United States for the District of Oregon, before you, or some of you, in a cause between the United States, complainant, and the Oregon Central Military Road Company, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company, defendants, No. 1632, wherein the decree of the said Circuit Court, entered in said cause on the 18th day of February, A.D. 1890, is in the following words, viz: "This cause was heard upon the pleas of the defendants filed to the bill of complaint herein, and was argued by Mr. Lewis L. McArthur, United States attorney, and by Mr. Charles B. Bellinger and Mr. Rufus Mallory, of counsel for the defendants. On consideration whereof, it is now here ordered, adjudged and decreed, that said pleas be and the same are hereby sustained, and that said bill of complaint be and the same is hereby dismissed.

GEO. M. SABIN,
Judge."

as by the inspection of the Transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety, the said cause came on to be heard before the said Supreme Court,

on the said Transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause, be and the same is hereby reversed in so far as it dismisses the bill.

And it is further ordered, that this cause be and the same is hereby remanded to the said Circuit Court with a direction to allow the plaintiff to reply to and join issue on the pleas.

May 25, 1891.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and decree of this Court as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed: Filed June 8, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit: on Wednesday, the 10th day of June, 1891, the same being the 41st judicial day of the regular April Term of said Court; present, the Honorable Stephen J. Field, Associate Justice U. S. Supreme Court, presiding, and the Hon. Matthew P. Deady, United States District Judge; the following proceedings were had in said cause, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, P. M. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and The California and Oregon Land Company. } No. 1632.

JUNE 10, 1891.

Now at this day comes the plaintiff in the above entitled cause by Mr. Franklin P. Mays, United States attorney, and the defendants by Mr. C. E. S. Wood, of counsel, and thereupon said defendants present to the court the mandate of the Supreme Court of the United States in this cause, now on file, in the words and figures following, to wit:

"UNITED STATES OF AMERICA—SS:

The President of the United States of America.

[Seal of U. S. Supreme Court.] To the Honorable the Judges of the circuit court of the United States for the district of Oregon.

Greeting:

Whereas, lately in the circuit court of the United States for the district of Oregon, before you, or some of you, in a cause between the United States, complainant, and the Oregon Central Military Road Company, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company, defendants, No. 1632, wherein the decree of the said circuit court, entered in said cause on the 18th day of February, A.D. 1890, is in the following words, viz: 'This cause was heard upon the pleas of the defendants filed to

the bill of complaint herein, and was argued by Mr. Lewis L. McArthur, United States Attorney, and by Mr. Charles B. Bellinger and Mr. Rufus Mallory, of counsel for the defendants. On consideration whereof, it is now here ordered, adjudged and decreed, that said pleas be and the same are hereby sustained, and that said bill of complaint be and the same is hereby dismissed.

GEO. M. SABIN,
Judge."

as by the inspection of the transcript of the record of the said circuit court, which was brought into the supreme court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety, the said cause came on to be heard before the said supreme court, on the said transcript of record, and was argued by counsel: On consideration whereof it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, be, and the same is hereby, reversed in so far as it dismisses the bill. And it is further ordered that this cause be and the same is hereby remanded to the said circuit court, with direction to allow the plaintiff to reply to and join issue on the pleas.

May 25, 1891.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and decree of this Court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

And moves the Court that a decree be entered herein in pursuance thereof; it is therefore adjudged and decreed that the decree heretofore entered in this cause be and the same is hereby reversed and set aside in so far as it dismisses the bill of complaint herein; and that said plaintiff be and it is hereby allowed three days from this date in which to reply to the pleas of the said defendants.

DEADY, J.

Endorsed: Filed June 10, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit: on the 13th day of June, 1891, there was duly filed in said Court a replication, in words and figures as follows, to wit:

In the circuit court of the United States, for the District of Oregon.

THE UNITED STATES

vs.

THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, P. M. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company.

To the Honorable the Judges of the Circuit Court of the United States, for the District of Oregon:

The replication of the United States, plaintiff, to the answers and pleas of the above named defendants.

This repliant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answers and pleas, for replication thereunto saith, that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto; and that the said answers and pleas of the said defendants are uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answers and pleas contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things

this repliant is and will be ready to aver and prove, as this Honorable Court shall direct; and humbly prays as in and by its said bill it hath already prayed.

W. H. MILLER,
Attorney General.
FRANKLIN P. MAYS,
U. S. Attorney for Oregon.
CHARLES E. LOCKWOOD,
Assistant U. S. Attorney for Oregon.
W. CAREY JOHNSON,
Special Assistant U. S. Attorney.

Due service of the within replication by certified copy, as provided by law, is hereby admitted at Portland, Oregon, June 13, 1891.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Defendant, the California and Oregon Land Company.

Endorsed: Filed June 13, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Friday, the 31st day of July, 1891, the same being the 62d judicial day of the Regular April Term of said Court; present: The Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Co. *et al.* } No. 1632.

Now at this day, on motion of Mr. Franklin P. Mays, United States Attorney, it is ordered that Mr. Albert H. Tanner be and he is hereby allowed to enter his appearance as counsel for the plaintiff herein.

And afterwards, to wit, on the 31st day of July, 1891, there was duly filed in said Court a præcipe for appearance of plaintiff in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, complainant,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, G. E. Pengra, G. W. Colby, *et al.*

To the Clerk of the above entitled Court:

You will please enter my appearance as solicitor in the above entitled cause for the complainant having been appointed Assistant Attorney by Attorney General.

A. H. TANNER.

Endorsed: Filed and entered July 31, 1891.

R. H. LAMSON, Clerk.

By A. B. Lamson, Deputy Clerk.

And afterwards, to wit, on the 4th day of August, 1891, there was duly filed in said Court, a notice to take testimony in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, complainant,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, G. W. Colby, *et al.*, defendants.

To Dolph, Bellinger, Mallory & Simon, solicitors for the defendant:

You will please take notice that the complainant desires the evidence to be adduced in this case to be taken orally before Geo. H. Durham, Examiner, under the 67th Rule of the Supreme Court as amended.

F. P. MAYS, U. S. District Attorney,
and A. H. TANNER, Solicitors for Complainant.

Due service of the foregoing notice is hereby admitted and accepted at Portland, Oregon, this 4th day of August, 1891.

RUFUS MALLORY,
Of Solicitors for Defendant.

Endorsed: Filed August 4, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 7th day of August, 1891, there was duly filed in said court a motion to extend time for taking testimony and affidavit, in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, C. W. Colby, *et al.*, Defendants.

NOTICE.

To Dolph, Bellinger, Mallory & Simon, solicitors for the defendants:

You will please take notice that the complainant will on Wednesday, the 12th day of August, 1891, at 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, move the court to enlarge and apportion the time which shall be allowed the parties hereto respectively in which to take testimony herein, as provided by the 67th Rule of the Supreme Court as amended.

F. P. MAYS, U. S. District Attorney,
and A. H. TANNER, Solicitors for Complainant.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, C. W. Colby, *et al.*, Defendants.

MOTION.

Now comes the above named complainant and moves the court to enlarge and extend and apportion the time which shall be allowed the parties hereto respectively in which to take testimony herein as provided by the 67th Rule of the Supreme Court as amended, so as to allow the plaintiff 30 days in which to take its testimony after the defendants have put in their testimony in support of the pleas and answers herein filed.

This motion is based upon the affidavit of Albert H. Tanner, hereto attached and marked Exhibit "A" and the pleadings and papers on file herein.

F. P. MAYS, U. S. District Atty.,
and A. H. TANNER, Solicitors for Complainant.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, G. W. Colby, *et al.*, defendants.

AFFIDAVIT.

UNITED STATES OF AMERICA,
District of Oregon, County of Multnomah. } ss.

I, Albert H. Tanner, being first duly sworn, say: That I am one of the solicitors for the complainant in the above entitled cause.

That the reply to the pleas and answers herein filed was filed in this Court on the 13th day of June, 1891, and this cause put at issue upon the said pleas.

That consequently but little more than 30 days remains in which to take the testimony herein under the 67th Rule of the Supreme Court allowing three months to the taking of the testimony in any cause after the same is put at issue.

That no testimony has been taken as yet in their behalf by either of the parties to this suit.

That the time remaining, to wit: about 30 days, is insufficient, and that it will be impossible for the complainant to take its testimony herein in support of the bill and issues made upon the said pleas within that time.

That upon the question of showing the fraud charged in the bill and notice thereof to the defendants, it will be necessary for the complainant to take the testimony of a large number of witnesses residing in remote parts of the State, along the line of the road mentioned in the bill, and to secure the attendance of the said witnesses in Portland for examination in this case.

That many of said witnesses reside from 400 to 500 miles from the city of Portland, and that it will require a considerable time to subpœna said witnesses and to secure their attendance and take their testimony herein.

That I believe complainant ought to have at least 60 days after the defendants have put in their testimony in support of their plea to take testimony in answer thereto and in support of the bill.

That there are two other cases of the same nature to this one now pending in this Court, which were put at issue at the same time and in which the same issues are made and upon which it will be necessary to take a large amount of testimony from a large number of witnesses residing in other and different portions of the State, some of them 400, 500 and 600 miles from the city of Portland where said testimony is to be taken, and that in order to take the testimony in each of said cases, which the complainant proposes to take in support of the fraud charged in the bill and to show notice thereof to the defendants, the same will necessarily have to be taken in each of said cases separately, and as there is but one Examiner before whom the testimony can be taken, a further and longer time should be allowed in said other cases than in the one in which the testimony is first taken.

That I verily believe that it will be impossible for the complainant to take its testimony in said cases within the time remaining of the 90 days since the cases were put at issue.

That 30 days should be allowed in the first case to the complainant to take its testimony after the defendants have put in theirs, 60 days in the second, and 90 days in the third, and that a shorter time than that allowed to the complainant in each of said suits will greatly embarrass it and render it impossible to get in all the testimony it desires to introduce in support of the bill herein and upon the issues made upon the said pleas and answers herein filed.

A. H. TANNER.

Subscribed and sworn to before me this 6th day of Aug., 1891.

[SEAL.] H. G. PLATT,
Notary Public for Oregon.

Due service of the foregoing notice, motion and affidavit is hereby admitted at Portland, Oregon, this 6th day of August, 1891.

DOLPH, BELLINGER, MALLORY & SIMON.

Endorsed: Filed August 7, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 7th day of August, 1891, there was duly filed in said Court, a certificate from Examiner in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Lunning, W. C. Belcher, B. F. Simpson, J. W. Peck, Isaac Allen, B. F. Parker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, B. J. Pengra, and The California and Oregon Land Company, defendants.

DISTRICT OF OREGON, ss.

AUGUST 6, 1891, 1:30 P.M.

At this day the above entitled cause came on for taking testimony before me, at my office, in the city of Portland, in said district, the complainant appearing by F. P. Mays, United States District Attorney, and A. H. Tanner, his assistant, and the defendants appearing by Rufus Mallory, of their counsel; whereupon the following proceedings were had, to wit: Geo. H. Durham, Examiner.

Counsel for complainant now state that they claim under the issues joined in this suit that the burden is upon it to begin the taking of testimony in support of the bill to prove the allegations of fraud therein charged and notice thereof to the defendants, and at this time propose to offer testimony in support of their bill, and for that purpose call as a witness in behalf of the complainant herein George Joseph and ask to have him sworn, and to have his testimony taken herein as required by the 67th Rule of the Supreme Court as amended.

Counsel for the defendant, the California and Oregon Land Company, object to the introduction of the witness by the complainant for the purpose of proving the allegations of its bill at this time, and claims that the only questions to be established by proofs are upon issues between the plea and the reply filed herein; that the onus of proof of truth of the plea is upon the defendant, and that the question of construction of the road or any other questions of fraud charged in the bill cannot be enquired about, but evidence can only be now introduced to prove the truth of the plea; therefore objects to the calling of the witness and to the witness being sworn or examined at this time.

George Joseph, being called as a witness in behalf of the complainant and duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. TANNER:

My name is George Joseph, my age is 19, my residence Portland, Oregon, occupation law student.

Q—Are you acquainted with the line of the Oregon Central Military Road leading from Eugene over the mountains to Southeastern Oregon?

Objected to by counsel for defendant as incompetent, immaterial and not proper testimony to be introduced at this time.

A—Yes, sir, I am.

Q—Have you been living on the line of this road at any time?

Objected to as immaterial and incompetent.

A—Yes, near it; within five miles of it.

Q—I will ask you to state fully whether or not any wagon road was ever constructed or built by the Oregon Central Military Road Company over or upon the route of said road, and state fully all that you know about the manner in which said road was built, if any was built, whether the streams across which it was built were bridged, whether any grades were made or turnouts, and state fully the manner in which said road was built and constructed, if any such road was built, and when it was and by whom?

Counsel for the defendant objects to the question as immaterial and irrelevant; that under the pleadings as they stand now in the court testimony concerning the construction of the road cannot be introduced and ought not to be introduced into the record; and counsel therefore requests the Examiner that before this answer is made the question as to its materiality and competency and its whole relation to the case shall be certified to the court for its determination and decision before any further testimony is taken.

Examiner's Note—I am requested by defendant's counsel, under the provisions of the United States Equity Rule No. 67, to certify to the court for its consideration and determination three questions:

First—Whether or not the burden of proof is upon the complainant to maintain at this time by its testimony the allegations of the bill so that it will be entitled to the affirmative in opening and closing the testimony; and

Second—Whether or not it is competent for the complainant to introduce at this time evidence tending to show the manner of the construction of the alleged road, the fact that such construction did not comply with the law, and that the defendants had notice thereof; and

Thirdly—Whether under the pleadings as they now are in this cause, the only matter to be proved is the truth of the matter in issue between the plea and the replication, and whether the affirmative of this proof is not upon the defendant.

And accordingly I herewith certify these questions to the court for its consideration.

Respectfully submitted,

GEORGE H. DURHAM, Examiner.

Whereupon an adjournment was now taken herein until 10 o'clock to-morrow morning.

GEORGE H. DURHAM, Examiner.

DISTRICT AND STATE OF OREGON, } ss.
County of Multnomah. }

I, George H. Durham, Examiner, do hereby certify that I have prepared the foregoing copy of record, and have carefully compared the same with the original thereof, and that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 6th day of August, 1891.

GEO. H. DURHAM.

Endorsed: Filed August 7, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Friday, the 7th day of August, 1891, the same being the 65th judicial day of the regular April term of said court; present, the Honorable Matthew P. Deady, United States District Judge presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company et al. } No. 1632.

August 7, 1891.

Now at this day this cause comes on to be heard upon the following question certified from the Examiner, viz: "Whether or not the burden of proof is upon the complainant to maintain at this time by its testimony the allegations of the bill so that it will be entitled to the affirmative in opening and closing the testimony"; and was argued by Mr. Franklin P. Mays and Mr. A. H. Tanner, of counsel for the plaintiff, and by Mr. Rufus Mallory, of counsel for the defendants; on consideration whereof, it is ordered that the defendants do first proceed to take testimony in support of their pleas.

And afterwards, to wit: on Saturday, the 8th day of August, 1891, the same being the 66th judicial day of the Regular April Term of said Court; present, the Honorable Matthew P. Deady, United States District Judge, presiding; the following proceedings were had in said case, to wit:

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMpany et al. } No. 1632.

AUGUST 8, 1891.

Now at this day this cause comes on to be heard upon the application of the plaintiff for an order fixing the time in which to take testimony herein, and was argued by Mr. Franklin P. Mays and Mr. A. H. Tanner, of counsel for the plaintiff, and by Mr. Rufus Mallory, of counsel for the defendants; on consideration whereof it is ordered that said defendants have thirty days from this date in which to take their testimony; that said plaintiffs have thirty days thereafter in which to take its testimony, and that said defendants have ten days thereafter to take their testimony in rebuttal.

And afterwards, to wit: on the 28th day of August, 1891, there was duly filed in said Court a motion to amend answer of defendant, California and Oregon Land Co., in words and figures as follows, to wit:

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES, Plaintiff,
vs.
THE OREGON CENTRAL MILITARY ROAD COMpany et al. and the California & Oregon Land Company, Defendants. }

The defendant, the California and Oregon Land Company, moves the Court to amend the answer by it filed in this cause in support of its plea filed herein, by striking out allegations thereof and inserting others, as follows:

Strike out of the answer to paragraph five of said bill, beginning with line 8, on page 3 of said answer, and extending to and including line 12, on the same page.

PARAGRAPH 6.

Strike out all of the answer to paragraph six, on page three, and insert in lieu thereof the following:

"In answer to paragraph six of said bill of complaint, this defendant says that at the time of the purchase by this defendant of the lands in the said bill of complaint mentioned it has not knowledge, information or notice of the matters and things in said sixth paragraph of said bill contained, but it believes that neither the said Oregon Central Military Road Company, or any of its officers, agents or representatives, or that anyone in its behalf, fraudulently or otherwise, pointed out to said governor any county road, or led him to believe that any county road was owned or had been constructed by said company, and it says it believes that the said Oregon Central Military Road Company had, on and prior to the 27th day of July, 1866, constructed the fifty miles of road mentioned in said certificate of the Governor of Oregon, in all respects according to the requirements of the said act of Congress, which fact it believes the said Addison C. Gibbs, then Governor of Oregon, ascertained and knew from an examination of the same by him made and by proof thereof to his satisfaction."

PARAGRAPH 7.

Strike out all of the answer to paragraph seven from line 24 to line 28, both inclusive.

PARAGRAPH 8.

Strike out of the answer to the 8th paragraph of said bill, beginning with the word "denies" on the 30th line of the 4th page, and extending to and including the word "contained" in the same line of the same page, and insert instead thereof "had no knowledge, information or notice of the matters and things in said eighth paragraph of said bill contained." Also insert after the words "it says," on the first line of the fifth page of said answer, the words "it believes." Also insert after the words "which fact," in the 4th line of the 5th page, the words "it believes."

PARAGRAPH 9.

Strike out of paragraph nine, beginning at the words "denies" in the 8th line of the 5th page, and extending to and including the word "persons" in the 12th line of the same page, and insert as follows: "Says that it has no knowledge, information or notice that said certificate issued as aforesaid by the Governor on November 26th, 1867, was procured by the said road company by or through any false or fraudulent representations by the officers, stockholders, agents or representatives thereof, or any of them, or of any person or persons." Strike out that portion of said paragraph 9 of said answer beginning with the word "on" in the 18th line of the 5th page and extending to and including the whole of line 21 of the same page.

PARAGRAPH 11.

Strike out the whole of paragraph eleven of said answer and insert instead thereof:

"In answer to paragraph eleven of said bill of complaint, this defendant says it had not any knowledge, information or notice of the matters and things in the said paragraph eleven contained, and says it believes that the said Oregon Central Military Road Company had, on January 12th, 1870, constructed a road in all respects as required by said act of Congress, within the limits of said grant, from Eugene City to the eastern boundary of the State of Oregon, which fact it believes the said George L. Woods, then Governor of Oregon, well knew from an examination and inspection by him made, and from proof thereof to his satisfaction."

PARAGRAPH 12.

Strike out the whole paragraph and insert:

"In answer to paragraph twelve of said bill of complaint the defendant says it had not any knowledge, information or notice that any of said certificates were procured by said Military Road Company through any false or fraudulent representations by any of its officers, stockholders, agents or any other person, and it believes that no such representations were at any time made, or were so made to enable said company to falsely or fraudulently obtain possession or

control of any of the lands of said grant, or that the acceptance of the said road was a fraud upon the United States."

PARAGRAPH 13.

Strike out paragraph 13 and insert:

"In answer to paragraph thirteen of said bill of complaint this defendant says it had not any knowledge, information or notice prior to or at the time of the purchase by it of the land in said bill of complaint mentioned, and of the delivery of the deeds and payment of the money therefor, that said road was not graded, bridged, cleared and constructed in whole, through its entire length, and says it believes it was so constructed in all respects as required by said act of Congress so as to permit of its regular use as a wagon road, and so as to permit the transportation of property, troops and mails of the United States over the same."

PARAGRAPH 14.

Strike out the whole paragraph and insert:

"In answer to paragraph fourteen of said bill of complaint this defendant says it has no knowledge, information or notice of the matters and things in said paragraph fourteen contained, but says it believes that the said Oregon Central Military Road Company constructed said road as required by said act of Congress, and in so doing expended about $130,000, and that the lands granted to said company were disposed of by it to reimburse it for such expenditure."

PARAGRAPH 15.

Insert after the word "says" in the 22nd line of the 7th page of said answer to said bill, the words "it believes."

PARAGRAPH 17.

Strike out of said answer to paragraph 17 of said bill the word "denies" in the 9th line of the 8th page of said answer to said paragraph 17, and insert "says it has no knowledge, information or notice." Also insert after the word "says" in the 4th line of the 8th page of said answer, the words "it believes." Also strike out the word "denies" in the 19th

line of the 8th page, and insert "says it had no knowledge, information or notice." Insert after the word "says" in the 21st line of the 8th page, the words "it believes."

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Deft. Cal. & Or. Land Co.

Due service of the within motion by certified copy, as provided by law, is hereby admitted at Portland, Or., Aug. 27, 1891.

A. H. TANNER,
Of Solicitors for Pltf.

Endorsed: Filed August 28, 1891.
R. H. LAMSON, Clerk.

And afterwards, to wit, on Friday, the 28th day of August, 1891, the same being the 76th judicial day of the Regular April Term of said Court; present: the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company, *et al.* } No. 1632.

AUGUST 28, 1891.

Now at this day comes the plaintiff, by Mr. A. H. Tanner, of counsel, and the defendant, the California and Oregon Land Company, by Mr. Rufus Mallory, of counsel; and on motion of said defendant, it is ordered that said defendant be and it is hereby allowed to file an amended answer herein in support of its plea.

And afterwards, to wit, on the 3d day of September, 1891, there was duly filed in said Court an amended answer of defendant, C. & O. Land Co., in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, Plaintiff,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, T. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, C. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company, Defendants.

To the Honorable the Judges of the circuit court of the United States for the district of Oregon:

The amended answer of the California and Oregon Land Company, filed in pursuance of the order of the Court duly made, to the bill of complaint of the United States, complainant, accompanying the pleas of this defendant and fortifying the same, and not waiving the said pleas.

This defendant now, and at all times hereafter, saving to itself all and all manner of exceptions or otherwise that may or can be taken to the many errors, uncertainties and imperfections in the said plaintiff's bill contained, for answer thereto, or to so much thereof as this defendant is advised it is necessary or material for it to make answer to, answering says:

In answer to the first paragraph of the said bill, this defendant admits that all the allegations contained therein are true.

In answer to the second paragraph of the said bill, this defendant admits that all the allegations therein contained are true.

In answer to the third paragraph of the said bill, this defendant admits that all the allegations therein contained are true.

In answer to the fourth paragraph of the said bill, this defendant admits that all the allegations therein contained are true.

In answer to the fifth paragraph of the said bill, this defendant admits that the Governor of Oregon, on the 27th day

of July, 1866, made and issued the certificate set forth in said paragraph, but it says it had no knowledge, information or notice that either the officers, stockholders or agents of the Oregon Central Military Road Company, or any one of them, or any other person or persons acting in the interest of said company, or any such officers, stockholders or agents, or any or either of them, on the said 27th day of July, 1866, or at any other time, falsely or fraudulently represented to Addison C. Gibbs, then Governor of Oregon, or to any other person, that said road had been constructed for 50 miles, or for any distance, from Eugene City eastward, or from any other point or in any direction, as required by law, or that they, the said officers, stockholders, agents or representatives or other persons, or any one or more of them, then or at any time knew that any such representations were false, or that said road had not in any respect been constructed according to law, or that they or any of them made such alleged false and fraudulent representations, or any representations, or so did for the purpose of procuring the issuance of such certificate, or for any purpose.

In answer to paragraph six of said bill of complaint, this defendant says it has no knowledge, information or notice of the matters and things in said paragraph contained, and it had no knowledge, information or notice of the matters and things in said paragraph contained, and it had no knowledge, information or notice thereof at the time of the purchase by it of the land in said bill of complaint mentioned, and the payment of the purchase money and delivery of the deeds thereof.

In answer to the seventh paragraph of said bill of complaint, this defendant admits that the Governor of Oregon, on the 26th day of November, 1867, made and issued the certificate in said paragraph set forth, but it says it has no knowledge, information or notice of the other matters and things in said paragraph contained, and had no knowledge, information or notice thereof at the time of the purchase by it of the lands in said bill of complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor.

In answer to paragraph eight of said bill of complaint, this defendant says it had no knowledge, information or notice of the matters and things in the said paragraph contained, and had no knowledge, information or notice thereof at the time of the purchase by it of the lands in the said complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor.

In answer to paragraph nine of the said bill of complaint, this defendant says it has not, and at the time of the purchase by it of the lands in the bill of complaint mentioned, and the payment of the money and delivery of the deeds therefor, had not any knowledge, information or notice that said certificate, issued as aforesaid by the governor on the 26th day of November, 1867, was procured by the said road company by or through any fraudulent representations by the officers, stockholders, agents or representatives thereof, or of any of them, or of any person or persons.

In answer to paragraph ten of said bill of complaint, this defendant admits that the Governor of Oregon, on the 12th day of January, 1870, made and issued the certificate in said paragraph set forth; but it says that it has no knowledge, information or notice concerning the other matters in said paragraph alleged, and had not any knowledge, information or notice of any of said matters at the time of the purchase by it of the lands in said bill of complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor.

In answer to paragraph eleven of said bill of complaint, this defendant says it has not and had not at the time of the purchase by it of the lands in the bill of complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor, any knowledge, information or notice of the matters and things in the said paragraph of said bill contained.

In answer to paragraph twelve of said bill of complaint this defendant says it has not, and had not at the time of the purchase by it of the lands in the bill of complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor, any knowledge, information or notice that any of said certificates were procured by

said Military Road Company through any false or fraudulent representations by any of its officers, stockholders, agents or any other person or for any purpose whatever.

In answer to paragraph thirteen of said bill of complaint, this defendant says it had not at the time of the purchase by it, the payment of the purchase money and delivery of the deeds of the land in the bill of complaint mentioned, it had not any knowledge, information or notice that the said road was not graded, bridged, cleared and constructed in whole through its entire length, or that said road was not constructed and completed in all respects as required by said act of Congress, or so as to permit of its regular use as a wagon road, so as to permit the transportation of property, troops and mails of the United States over the same.

In answer to paragraph fourteen of said bill of complaint this defendant admits that the said act of Congress in granting the lands in the bill of complaint mentioned to the State of Oregon, declares that the lands so granted shall be exclusively applied to the construction of the road and for no other purpose, but it says that at the time of the purchase by it of the lands in the bill of complaint mentioned, and of the payment of the purchase money and the delivery of the deeds therefor, it had not and has not any knowledge, information or notice that said lands were not so disposed of, or that the proceeds thereof were not applied exclusively to the construction of said road, or to the construction of bridges thereon, or establishing ferries on streams along the line of said road.

In answer to the fifteenth paragraph of said bill of complaint this defendant denies the allegations therein contained.

In answer to paragraph sixteen of said bill of complaint this defendant says that the statements therein contained are true.

In answer to paragraph seventeen of said bill of complaint this defendant says that it is true that the Commissioner of the General Land Office and the Secretary of the Interior did on the several dates in the said paragraph mentioned execute and deliver to the State of Oregon, for the benefit of said road, certified lists of land as in said para-

graph alleged, and it believes the number of acres so certified to be correctly stated in the exhibits attached to the bill of complaint, and this defendant admits that the President of the United States did, as alleged in said paragraph, issue to the Oregon Central and Military Road Company patent or patents for the number of acres therein mentioned, but this defendant says it has not and at the time of the purchase and payment of the purchase money by it of the land described in said bill of complaint and the delivery of the deeds therefor, it had not any knowledge, information or notice of the other matters and things in said paragraph contained.

In answer to paragraph eighteen of said bill of complaint this defendant admits the execution and delivery of the several conveyances and transfers therein mentioned, and it says that said grant, and all rights and interests thereunder, have passed by such conveyances and are now held by and vested in the defendant, the California and Oregon Land Company, except as to about 3000 acres heretofore sold and conveyed by said company.

In answer to paragraph nineteen of said bill of complaint this defendant admits the matters therein stated to be true.

In answer to paragraph twenty of said bill of complaint this defendant says it believes that the maps or plats referred to in the certificate hereinbefore mentioned, show the line of said road, the aggregate amount of land included in said grant, the number of acres which have been in effect patented, and the number of acres for which said company claims the right to have patents issued, as stated in said paragraph; but denies that the claim of said company to have of right a patent issued for the land so claimed is questionable, and it says that it has good right in equity to such patent.

In answer to paragraph twenty-one of said bill of complaint this defendant says that neither of the defendants, nor any of its officers, stockholders, or agents, at the time of the execution and delivery of said deeds, or at the time of the execution of any of such deeds, or at the time of the accruing of any of their interests in said land, or at any time, had any knowledge, information or notice that the road provided

for in said act of Congress had not been constructed as required by the said act, or so as to be in every sense a public highway, or so that it could be used by the United States or by any of the citizens or residents thereof as a public highway, or so that the United States could transport its property, troops or mails over the same, and it says that neither of them have at any of such times, or at any time, any knowledge, information or notice that no grade has been established or constructed upon any part of said road, or that no clearing had been done on any part thereof, or that no bridge or bridges had been built, or ferries established, over any stream on the line thereof, or that no cuts or turnouts had been constructed at every proper place on said line of road; that neither of them had at any time any knowledge, information or notice that said road was not begun and completed within five years from the date of the passage of said act of Congress, or that it had never been begun or constructed; that neither of them at any time knew that any of the statements made in any of the said certificates of the said governor of Oregon were false, or that either of the said governors did not examine the road in every part thereof referred to in such certificates, or that either of said certificates had been procured by false or fraudulent representations, or that either of said patents were procured upon any false certificates.

And this defendant further answering the matters in said bill of complaint alleged, says: That on or about the 15th day of May, 1874, the defendants G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, T. B. Simpson, purchased the undivided one-half interest in said land, and on or about October 15, 1874, the defendants G. W. Colby, N. Lunning, E. B. Pond, W. C. Belcher, N. D. Rideout, J. M. Peck, Isaac Allen, B. F. Baker, M. P. Jones and Isaac Lohman, purchased the remaining half undivided interest in said land; that at the time of making each of said purchases they and each of them were residents of the State of California, and placing confidence in the truth of the hereinbefore mentioned certificates of the governor of Oregon, that the said road had been duly and seasonably

constructed and completed in accordance with the terms of the said granting acts, and also in the said several certificates of the Commissioner of the General Land Office and Secretary of the Interior, did make said purchases in good faith and for valuable considerations, to wit: for the total sum of $200,000, from the defendants B. G. Pengra and C. Pengra, who had succeeded to the ownership of the said grant of land, through the act of the legislature of Oregon, and the conveyances, assignments and transfers of said Oregon Central Military Road Company, as stated in the bill of complaint herein.

And this defendant avers that said sum of $200,000 was paid by said defendant in money truly and *bona fide*, and without notice previous thereto or to the delivery of the conveyances thereof, or of any of the pretended fraudulent representations or acts in the bill of complaint set forth, and without any reason to believe or suspect that there had been any fraudulent act or misrepresentation, or failure of duty in the examination or certifying the completion of said road, or any part thereof, or that said road had not been wholly, seasonably and properly completed in accordance with the requirements of said granting acts.

And this defendant says that said purchasers were the promoters, organizers and original stock subscribers and holders of the defendant, The California and Oregon Land Company; that said company is duly incorporated under the laws of the State of California for the purpose of taking said land grant, and as a convenient means of managing the property and interests of the said several purchasers in said land grant, and to this end said several purchasers did, on or about March 3, 1877, convey to said company their several interests in said grant in consideration of the interest and stock in said corporation severally held by them; that at the time of said transfer and conveyance to said corporation, neither the said company nor any of its officers, agents or stockholders had any notice or reason to believe or suspect that there had been any fraud or misrepresentation or failure of duty in the examination or certifying aforesaid, but the transfer to and taking by said company was had and done really, *bona fide*, and upon the confidence

placed by them and each of them in the truth of said certificates.

That so confiding and relying, and without notice or reason to believe or suspect any of the alleged fraudulent acts or misrepresentations in the bill of complaint charged, the said promoters and the said land company have really and *bona fide* paid in the care and expense attending said land more than the sum of $87,775.10, and in addition thereto have paid in taxes levied under the laws of Oregon more than the sum of $51,000.

That there has not been received by said company, or by its stockholders on account of said land, to exceed the sum of about $15,000, which sum has been derived from rents and sales thereof.

That since the conveyance of said grant and lands to said California and Oregon Land Company there have been from time to time sales and transfers of the said stock of the said company to others than its original stockholders, who are now the owners and holders of such stock, and were at the commencement of this suit; that such purchases have been made by such holders in the confidence reposed by them in the truth of said certificates, and in reliance upon the said hereinbefore mentioned listing of lands and upon the said act of Congress, approved June 18, 1874, and cited in the sixteenth paragraph of the bill of complaint herein; that various sums per share, up to $20 per share, were really and *bona fide* paid by such purchasers for such stock, without notice by them or reason to believe or suspect any of the alleged fraudulent acts or misrepresentations in the said bill charged; that said company's capital stock consists of 20,000 shares, which is, and at the beginning of this suit was, held by twenty-five stockholders, of whom only eight were original stockholders in said company or are defendants in this suit.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged, without this that there is any other matter, cause or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and

sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct; and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

E. B. POND,

[SEAL] President of the California and Oregon Land Company.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

The amended answer of the defendant, the California and Oregon Land Company, was taken before me, this 31st day of August, 1891, under the common seal of said corporation, as by its seal affixed appears.

[Seal of California and Oregon Land Company.]

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

On this 31st day of August, 1891, personally appeared E. B. Pond, President of the defendant, the California & Oregon Land Company, and made oath that he is the president of said company, and is familiar with its business affairs; that he has heard the foregoing amended answer read, and knows the contents thereof, and that the matters and things set forth therein, so far as it relates to the acts of the said defendant, are true, and so far as they relate to the acts of others, he believes the same to be true.

Subscribed and sworn to before me, this 31st day of August, 1891.

[SEAL] LEE D. CRAIG,

Commissioner of Deeds for the State of Oregon, resident in the City and County of San Francisco, State of California.

Endorsed: Filed September 3, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 5th day of September, 1891, there was duly filed in said court a replication to amended answer in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, Plaintiff,
vs.
THE OREGON AND CALIFORNIA MILITARY ROAD COMPANY, B. G. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, C. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company, Defendants.

Replication of the above named plaintiff to the plea and the amended answer in support thereof of the defendant, the California and Oregon Land Company:

This repliant, saving and reserving to itself all, and all manner or advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the said plea, and amended answer in support thereof, of the said defendant, for replication thereunto, saith, that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant; and that said plea and answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said plea or answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this Honorable Court shall direct; and humbly prays as in and by its said bill of complaint it hath already prayed.

F. P. MAYS AND
A. H. TANNER,
Solicitors for Complainant.

Due service of the within replication by certified copy, as provided by law, is hereby admitted at Portland, Or., Sept. 5, 1891.

RUFUS MALLORY,
Of Counsel for Plff.

Endorsed: Filed September 5, 1891.
R. H. LAMSON, Clerk.

And afterwards, to wit, on the 26th day of October, 1891, there was duly filed in said Court a certificate from Examiner in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, Complainant,
vs.
OREGON CENTRAL MILITARY ROAD COMPANY, Defendant. } No. 1632.

DISTRICT OF OREGON, ss.

MONDAY, October 26, 1891.

The parties to the above entitled suit appeared before me, at my office, the United States being represented by A. H. Tanner, Esq., its counsel, and the defendant by Rufus Mallory, Esq., of its solicitors, whereupon the following proceedings were had, to wit:

Counsel for the complainant now offers to call witnesses to show that the wagon road, known as the Oregon Central Wagon Road, and referred to in the bill in this suit, was never built as required by the act of Congress, and that the certificates of the governors that it was built and constructed were obtained by misrepresentation, as charged in the bill.

Counsel for the defendant, the California and Oregon Land Company, objects to the introduction of this testimony as immaterial and irrelevant for the purpose of controverting the matters contained in the plea or the testimony introduced in pursuance thereof.

EXAMINER—Let the record show that George Joseph, heretofore sworn as a witness in behalf of the complainant in this cause, was thereupon called to the stand and interrogated by complainant's counsel as follows:

Q—State fully and at length all you know as to whether or not the wagon road, known as the Oregon Central Military Wagon Road, referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way the certificates of the governors of Oregon that said road or portions thereof had been built, were obtained.

Counsel for the defendant objects to the question as irrelevant and immaterial to the issue made by the plea in this cause, and as immaterial for the purpose of answering any evidence taken in support of the plea and for the further reason that the plea raises no issue upon the question of the construction of the road, or the issuance of the certificates, and before an answer shall be made to the question, counsel for the defendant, the California and Oregon Land Company, requests the Examiner to certify the question to the court for his opinion as to whether the question should be answered.

Examiner's Note.—Before taking the answer I will certify this question to the court as requested by counsel for the defendant, for the purpose of taking the opinion of the court as to the relevancy and materiality of the testimony sought by the question referred to.

GEO. H. DURHAM, Examiner.

DISTRICT OF OREGON, ss.

I, G. H. Durham, do hereby certify that the foregoing is a correct transcript of the proceedings had before me in the above entitled suit on the 26th day of October, 1891, and the whole thereof. And I hereby certify the same to this Honorable Court for its opinion as to whether said testimony shall be received.

Witness my hand, October 26, 1891.

GEO. H. DURHAM, Examiner.

Endorsed: Filed October 26, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Monday, the 26th day of October, 1891, the same being the 12th judicial day of the Regular October Term of said court. Present: The Hon-

orable Matthew P. Deady, United States District Judge presiding, the following proceedings were had in said case, to wit.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, ET AL. } No. 1632.

OCTOBER 26, 1891.

Now, at this day this cause comes on to be heard, upon the question and objection thereto, certified from the Examiner, as follows: Question by counsel for plaintiff, propounded to George Joseph, a witness for said plaintiff: "State fully and at length all you know as to whether or not the wagon road known as the Oregon Central Military Wagon Road, referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way the certificates of the governors of Oregon, that said road or portions thereof had been built, were obtained." "Counsel for defendants objects to the question as irrelevant and immaterial for the purpose of answering any evidence taken in support of the plea, and for the further reason that the plea raises no issue upon the question of the construction of the road or the issuance of the certificates"; and was argued by Mr. Albert H. Tanner, of counsel for the plaintiff, and by Mr. Rufus Mallory, of counsel for said defendants.

On consideration whereof, it is ordered that said objection be and the same is hereby sustained.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY ET AL. } No. 1632.

Now at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant, the California and Oregon Land Company, it is ordered, that said defendant be and it is

hereby allowed to amend its plea to the bill herein by striking out the words: "That each of said several certificates were made honestly and in good faith, and without any fraudulent intent, or procurement or false representation by any person whomsoever," at the bottom of the second page of said plea.

And afterwards, to wit: on Monday, the 23d day of November, 1891, the same being the 30th judicial day of the Regular October Term of said court; present, the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to-wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY et al. } No. 1632.

NOVEMBER 23, 1891.

Now at this day comes the plaintiff, by Mr. A. H. Tanner, of counsel, and the defendants by Mr. Rufus Mallory, of counsel, and on motion of said defendants, it is ordered, that the clerk of this court open and publish the depositions now on file in this cause, and that this cause be and the same is hereby set for hearing on the pleas and answers of said defendants, on Wednesday, November 25, 1891.

And afterwards, to wit: On Monday, the 7th day of December, 1891, the same being the 39th judicial day of the Regular October Term of said Court. Present: the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES,
vs.
THE OREGON CENTRAL MILITARY ROAD COMpany, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, E. B. Pond, Nicholas Lunning, W. C. Belcher, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, P. M. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company.

No. 1632.

December 7, 1891.

This cause was heard upon the bill, the amended pleas and answer of the defendant, the California and Oregon Land Company, the replication thereto, the testimony and exhibits, and was argued by Mr. Franklin P. Mays, United States Attorney, and Mr. Albert H. Tanner, of counsel for the plaintiff, and by Mr. Rufus Mallory, of counsel for said defendant; on consideration whereof the court finds that the certificates of the governor of Oregon declaring the road mentioned in the bill to have been duly constructed, were truthfully made, without fraud or misrepresentation on the part of any one; and that said defendant, the California and Oregon Land Company, is the purchaser of the land described in said bill from the Oregon Central Military Road Company in good faith, for a valuable consideration, and without notice of any fraud or misrepresentation on the part of said Oregon Central Military Road Company, or any one else. It is therefore ordered, adjudged and decreed that said plea of said defendant be, and the same is, hereby sustained, and that said bill of complaint be, and the same is, hereby dismissed, as to said defendant, the California and Oregon Land Compnay.

(Signed) DEADY, J.

Endorsed: Filed Dec. 7, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on the 28th day of December, 1891, there was duly filed in said court an assignment of errors in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON CENTRAL MILITARY ROAD Company, B. J. Pengra, C. E. Pengra, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, F. B. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, C. H. Holbrook, Isaac Lohman, A. D. Breed, and the California and Oregon Land Company, Defendants.

The above named complainant, conceiving itself aggrieved by the proceedings in this cause and the final decree entered in the above entitled cause and court on the 7th day of December, 1891, doth hereby appeal from the same to the United States circuit court of appeals for the ninth circuit, and it prays that this appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the clerk of the said court, as provided by law, and the rules thereof.

Complainant hereby assigns the following grounds of error upon which it claims and alleges that said decree was erroneous and should be reversed, to wit:

First. The court erred in sustaining the objections of the defendants to the testimony offered by complainant to show that the wagon road mentioned in the bill herein was never built or constructed, and to show that the certificates of the governors, that such road was built, were obtained by misrepresentation and fraud; and in sustaining the objection to the question propounded to the witness George Joseph, to wit: "I will ask you to state fully whether or not any wagon road was ever constructed or built by the Oregon Central Military Road Company over or upon the

route of said road, and state fully all that you know about the manner in which said road was built, if any was built, whether the streams across which it was built were bridged, whether any grades were made or turnouts, and state fully the manner in which said road was built and constructed, if any such road was built, and when it was and by whom?" And in excluding said testimony so offered.

Second. The Court erred in sustaining the objection of said defendants to the testimony offered by complainant after the defendants had taken their testimony and rested upon the issues arising on the plea and answer filed herein; and in sustaining the said defendants' objection to the following question propounded to the witness George Joseph: "Question.—State fully and at length all you know as to whether or not the wagon road known as the Oregon Central Military Wagon Road referred to in the bill in this suit was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way the certificates of the governors of Oregon, that said road or portions thereof had been built, were obtained?" And in excluding said testimony so offered.

Third. The Court erred in making said decree made and entered herein on the 7th day of December, 1891, sustaining the pleas of the said defendants, the California and Oregon Land Company, and in dismissing the bill of complaint as to the said defendant, the California and Oregon Land Company.

Fourth. The finding of the Court in said decree, that the certificates of the governors of the State of Oregon declaring the road mentioned in the bill to have been duly constructed were truthfully made, without any fraud or misrepresentation on the part of anyone, is contrary to the admissions made in the plea and answer of the said defendant and is against the evidence.

Fifth. The finding of the Court in said decree, that said defendant, the California and Oregon Land Company, is the purchaser of the lands described in said bill from the Oregon Central Military Road Company in good faith and

for a valuable consideration, and without notice of any fraud or misrepresentation on the part of the said Oregon Central Military Road Company or anyone else, is against the evidence and contrary to law.

Sixth. The Court erred in sustaining the exceptions taken by the defendants N. D. Rideout, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, J. W. Peck, B. F. Baker, M. P. Jones, Isaac Lohman, and the California and Oregon Land Company, to the portions of the bill of complainant herein filed and specified in said exceptions.

Seventh. That the said decree and findings therein stated are eroneous, against the evidence and contrary to law.

F. P. MAYS, U. S. Dist. Atty.,
ALBERT H. TANNER,
Solicitors for Complainant.

Endorsed: Filed Dec. 28, 1891.

R. H. LAMSON, Clerk.

And afterwards, to wit, on Monday, the 28th day of December, 1891, the same being the 54th judicial day of the regular October term of said court; present: the Honorable Matthew P. Deady, United States District Judge, presiding, the following proceedings were had in said case, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD CO. ET AL. } No. 1632.

DECEMBER 28, 1891.

Now, at this day, on motion of Mr. Albert H. Tanner, of counsel for the plaintiff, it is ordered that said plaintiff be and it is hereby allowed to take an appeal of this cause from the decree rendered therein on December 7, 1891, to the United States circuit court of appeals for the ninth circuit.

In the circuit court of the United States for the district of Oregon.

The President of the United States of America, to L. S. B. Sawyer, Clerk U. S. Circuit Court, San Francisco, California.

Greeting:

Know ye, that we in confidence of your prudence and fidelity, have appointed you a Commissioner, and by these presents do give you full power and authority diligently to examine John Boggs, N. D. Rideout, Edgar Mills, B. F. Baker, M. P. Jones, D. H. Holbrook, A. D. Breed, L. L. Baker, Robert Hamilton, and James Carroll, each, upon his corporal oath or affirmation, before you to be taken, and upon the interrogatories and cross-interrogatories hereto annexed, as a witness on the part of the defendants in a certain cause now pending undetermined in the circuit court of the United States of America for the district of Oregon wherein the United States is plaintiff and the Oregon Central Military Road Company et al. are defendants, and we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal and direct it to the clerk of the above entitled court, at Portland, in the district of Oregon, as soon as may be after the execution of this commission; and that you return the same, when executed as above directed, with the title of the cause endorsed on the envelope of the commission.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Portland, in said district, this the 15th day of August, A. D. 1891.

[Seal of U. S. circuit court.] R. H. LAMSON.

By R. B. Lamson, Deputy Clerk.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY WAGON ROAD COMPANY *et al.*

Interrogatories to be propounded to John Boggs, N. D. Rideout, Edgar Mills, B. F. Baker, M. P. Jones, D. H. Holbrook, and A. D. Breed, witnesses on the part of the defendants.

Int. 1—State your name, age, residence and occupation?

Int. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

Int. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

Int. 4—Were you or were you not one of the purchasers of a tract of land granted by the Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2nd, 1864, and afterwards granted by the State of Oregon by an act of its legislature approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

Int. 5—if you answer that you were one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid and whether the same was paid, and when and how?

Int. 6—At the time, or previous thereto, of the making of such purchase, and the payment of the money and the delivery of the deeds thereof to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe that there had been any fraudulent act or misrepresentation, or failure of duty in the examination or certifying the completion of the wagon road mentioned in

said act of Congress of July 2nd, 1864, or any part thereof, or that the said road had not been constructed wholly, seasonably and properly, according to the granting acts?

Int. 7—Had you or had you not, at or prior to the date of said purchase, the delivery to you and your associates of the deeds for said land, and the payment of the purchase price thereof, any knowledge, information, notice, suspicion or ground of suspicion, or reason to suspect or believe that any fraud had been practiced, or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers or agents, or stockholders, or by any other person or persons acting in its interest or its employ, or by any person or persons whomsoever, to the governor of the State of Oregon, to induce such governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them, or either of them, to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States, to induce that officer to falsely issue patents for said lands?

Int. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

Int. 9—If in answer to Interrogatory 8 you say that you conveyed said land to the California & Oregon Land Company, please state what, if any notice, knowledge, information, suspicion or ground to suspect, or reason to believe, the said California & Oregon Land Company, or any of its officers, or agents, or stockholders, or yourself, had at and prior to the conveyance to the said company by you and your associates of said lands, and the delivery of the deeds therefor, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying the completion of said wagon road by the governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior, or the Commissioner of the General Land Office, or issuing of the patents for any of said lands by the President of the United States?

Int. 10—State what was the fact as to the purchase made by yourself and your associates of this land from the Oregon Central Military Road Company and the purchase thereof made by the California and Oregon Land Company from you, having been made in good faith, without notice of any fraud whatever, and for value?

Int. 11—State fully and at large, any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Defendant the California & Oregon Land Company.

Due service of the within interrogatories by certified copy, as provided by law, is hereby admitted, at Portland, Or., August 11th, 1891.

A. H. TANNER,
Attorney for Plaintiff.

Endorsed: Filed August 15, 1891.
R. H. LAMSON, Clerk.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, ET AL.

Interrogatories to be propounded to L. L. Baker, Robert Hamilton and James Carroll, witnesses on the part of the defendants:

Int. 1—State your name, age, residence, and occupation?

Int. 2—Are you or are you not a stockholder in the California and Oregon Land Company, one of the defendants in this suit?

Int. 3—If you answer yes, please state when you became such stockholder?

Int. 4—Please state whether or not at the time you became such stockholder, or at any time prior thereto, you had any notice, knowledge, information, suspicion or reason to suspect or believe that any fraud had been practiced upon or any misrepresentations made to the Governor of Oregon by any officer of the defendant, the Oregon Central Military Road Company, or any of its stockholders or agents or persons in its employ, or by any person or persons whomsoever, to falsely induce said Governor to certify that the wagon road described in the act of Congress of July 2nd, 1864, and mentioned in the bill of complaint, had been duly and seasonably constructed as required by said act.

Int. 5—In what does the properties of the California and Oregon Land Company consist?

Int. 6—If in answer to the last preceding interrogatory, you say "lands," please state what lands?

Int. 7—If in answer to the last preceding interrogatory you say "lands granted by the Congress of the United States to the State of Oregon," please state upon what you relied, if anything, in making purchase of the stock of the California and Oregon Land Company as evidence that the land had been duly earned and that the title was in the California and Oregon Land Company?

Int. 8—State fully and at large any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for defendant, the California and Oregon Land Company.

Due service of the within interrogatories, by certified copy as required by law, is hereby admitted at Portland, Or., August 11, 1891.

A. H. TANNER,
Attorney for Plaintiff.

Endorsed: Filed August 15, 1891.

R. H. LAMSON, Clerk.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company, *et al.*

Cross-interrogatories to be propounded to John Boggs, N. D. Rideout, Edgar Mills, B. F. Baker, M. P. Jones, D. H. Holbrook and A. D. Breed, witnesses on the part of the defendant.

Cross Int. 1—Are you an officer or director in the California and Oregon Land Company?

Cross Int. 2—When did you become a stockholder in said company?

Cross Int. 3—When and from whom did you acquire any shares of stock that you may now hold in the said company?

Cross Int. 4—Prior to your acquiring said stock, or the alleged purchase of the land grant in controversy herein, had you ever been in the State of Oregon or seen said lands or been over over the alleged wagon road of the Oregon Central Military Road Company; if so, when was it?

Cross Int. 5—What inquiry or research did you make, if any, before such alleged purchase and payment of the purchase price to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act. State fully?

Cross Int. 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the Governors of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grant or to the lands included therein?

Cross Int. 7—What part of the consideration for the purchase of said land grant was paid by you? How was it paid and when?

Cross Int. 8—Will you swear that to your own personal knowledge that all of your associates paid their proportion of such consideration?

Cross Int. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

Cross Int. 10—You will not undertake to swear, will you, of your own personal knowledge that your associates did not have any knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe that the said wagon road had not been built according to the granting acts?

Cross Int. 11—Was G. W. Colby one of your associates in said purchase?

Cross Int. 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete the said purchase?

Cross Int. 13—Will you undertake to swear that Mr. Colby did not have notice or information that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

Cross Int. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company? State fully what relation he had, if any, with said company?

Cross Int. 15—Did you know of your own personal knowledge what notice or information your associates might have had or might not have had, with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said wagon road had not been built as required by the granting act?

F. P. MAYS, U. S. Dist. Atty., and
A. H. TANNER,
Solicitors for Complainant.

Due service of the foregoing cross-interrogatories is hereby admitted at Portland, Oregon, this day of August, 1891.

RUFUS MALLORY,
Of Solicitors for Defendants.

Endorsed: Filed August 15, 1891.
R. H. LAMSON, Clerk.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company *et al.*

Cross-interrogatories to be propounded to L. L. Baker, Robert Hamilton and James Carroll, witnesses on the part of the defendants.

Cross Int. 1—How many shares of stock, if any, did you own or hold in the California and Oregon Land Company, and when and how did you acquire the same?

Cross Int. 2—Are you an officer or director in said company?

Cross Int. 3—Who did you acquire said stock from?

Cross Int. 4—Prior to the time you acquired said stock had you ever been in the State of Oregon or examined the land grant in controversy in this suit or been over or seen the road of the said Oregon Central Military Road Company?

Cross Int. 5—Did you make any inquiry or research to find out or to satisfy yourself as to the condition of the lands included in said grant or the title thereto or as to whether or not the said road had been duly or seasonably constructed as required by law; if so, state what they were?

Cross Int. 6—Prior to the time you acquired said stock in the California and Oregon Land Company did you ever see the certificates or alleged certificates of the Governors of Oregon that said road had been built; if so, who showed such certificates, when was it, and who else was present?

F. P. MAYS, U. S. Dist. Atty., and
A. H. TANNER,
Solicitors for Complainant.

Endorsed: Filed August 15, 1891.
R. H. LAMSON, Clerk.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company *et al.*

Be it remembered, that on the 20th, 21st, 22d, 24th and 25th days of August, A.D. 1891, at my office, room 51, in the United States Court building, in the city of San Francisco, district of California, personally appeared before me, a Commissioner duly appointed by the circuit court of the United States for the ninth circuit and district of Oregon, Edgar Mills, B. F. Parker, M. P. Jones, C. H. Holbrook, L. L. Baker, Robert Hamilton, James Carolan and John Boggs, witnesses on behalf of the defendants in the above entitled suit.

And said witnesses having been by me first cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as follows, that is to say:

Thursday, August 20th, 1891.

EXAMINATION-IN-CHIEF OF EDGAR MILLS.

Q. 1—State your name, age, residence and occupation?

A—My name is Edgar Mills; my age is sixty-three years; residence, Menlo Park, California, and I am a banker by occupation.

Q. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

A—I am a stockholder in the California and Oregon Land Company.

Q. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

A—I am one of the original subscribers for the stock of said company?

Q. 4—Were you or were you not one of the purchasers of a tract of land granted by the Congress of the United

States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2d, 1864, and afterwards granted by the State of Oregon by an act of its legislature, approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

A—I was one of the purchasers of the undivided one-half of the tract of land granted by the Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2d, 1864, and afterwards granted by the State of Oregon by an act of its legislature, approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon.

Q. 5—If you answer that you are one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid, and whether the same was paid, and when and how?

A—Sometime in the month of April, 1874, my attention was called to the purchase of an undivided one-half interest in these lands for the sum of one hundred thousand dollars, with the privilege of purchasing the other half at the same price. It was discussed somewhat by myself and friends, but my health being poor at the time I turned the matter over to my attorney in Sacramento, where I then resided, Mr. George Cadwalader, with the instructions to him to investigate the title and the whole matter, and advise me in the premises. In a few days thereafter I started for Carlsbad, Germany, for the benefit of my health; on reaching Cheyenne, en route to Europe, I received a telegram from my attorney, Mr. Cadwalader, stating in substance, as nearly as I can now remember, that he had examined the title to the said lands and found it good, and advising me to make the purchase. It had been proposed before I left Sacramento to divide the purchase in tenths, and I accordingly telegraphed a reply to Mr. Cadwalader to make the purchase of an undivided one-tenth for me, and provided him with ten thousand dollars to make the payment therefor at our

bank in Sacramento. I continued on my journey. Mr. Cadwalader concluded the purchase, and the ten thousand dollars was paid through our bank in Sacramento. The deed conveying said undivided half interest is dated the 15th day of May, 1874, and is from B. J. Pengra and wife to G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, and R. F. Parks, E. B. Pond, N. Lunning, W. C. Belcher, T. B. Simpson and myself. Consideration one hundred thousand dollars and the interest conveyed thereby was an undivided one-tenth each to said Colby, Boggs, Rideout, W. H. Parks, Pond, Lunning, Belcher, Simpson and myself, and the remaining undivided one-tenth to W. H. Parks and R. F. Parks. I paid ten thousand dollars in gold coin for my said one-tenth interest in the undivided one-half of the lands in the month of May, 1874.

Q. 6—At the time, or previous thereto, of the making of such purchase and payment of the money, and the delivery of the deeds thereof to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe that there had been any fraudulent act or misrepresentations or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts?

A—Neither at the time of said purchase, nor previous thereto, had I, or any of my associates in said purchase, to my knowledge, any knowledge, notice, or information, suspicion or ground of suspicion, or reason to suspect or believe that there had been any fraudulent act or misresentations or failure of duty in the examinations or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts.

Q. 7—Had you or had you not, at or prior to the date of said purchase, the delivery to you and your associates of

the deeds for said land, and the payment of said purchase price thereof, any knowledge, information, notice, suspicion or ground of suspicion, or reason to suspect or believe that any fraud had been practiced or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, or agents, or stockholders, or by any other person or persons acting in its interest or in its employ, or by any person or persons whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States to induce that officer to falsely issue patents for said land?

A—I had not at or prior to the time of making said purchase and the delivery of the deed and payment of said purchase price, any knowledge, information, notice, suspicion, or ground of suspicion, or reason to suspect or believe that any fraud had been practiced or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, or agents, or stockholders, or by any other person or persons acting in its interest or in its employ or by any person whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company or to the President of the United States to induce that officer to falsely issue patents for said lands.

Q. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

A—We conveyed the same to the California and Oregon Land Company, an incorporation under the laws of California.

Q. 9—If in answer to Interrogatory 8 you say that you conveyed said land to the California and Oregon Land Company, please state what, if any, notice, knowledge, information, suspicion, or ground to suspect, or reason to believe, the said California and Oregon Land Company, or any of its officers or agents or stockholders or yourself, had at and prior to the conveyance to said company by you and your associates of said lands, and the delivery of the deeds therefor, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of the lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said lands by the President of the United States?

A—The California and Oregon Land Company was organized by the owners of the land grants in controversy for the better and more convenient management of the same, particularly in case of the death of an owner therein and consequent embarrassment during the administration of his estate, and never to my knowledge, at the time of its organization, or at or prior to the conveyance to it and delivery of the deed or deeds to said lands, did it, or any of its officers, or agents, or stockholders, nor did I myself, have any notice, knowledge, information, suspicion, or ground to suspect, or reason to believe, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of the lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said lands by the President of the United States.

Q. 10—State what was the fact as to the purchase made by yourself and your associates of this land for the Oregon Central Military Road Company and the purchase thereof,

made by the California and Oregon Land Company from you, having been made in good faith without notice of any fraud whatever and for value?

A—The purchase by myself and associates from B. J. Pengra and wife of the said undivided one-half interest in said lands, and the transfer of the same to the California and Oregon Land Company by myself and associates, were each made in perfect and entire good faith, without notice of any fraud whatever, and for actual value. I know I paid my ten thousand dollars in good faith and in actual coin, and I never had any reason to doubt that my associates paid their respective amounts in the same manner. I was at Cheyenne en route to Europe at the time I telegraphed my attorney to consummate the purchase on my part, and left the whole matter to him to conclude.

Q. 11—State fully and at large any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

A—I know of no further facts material to the issue in this case, except to reaffirm that in the purchase I relied entirely upon the opinion of my attorney, Mr. Cadwalader, that the title was perfect in every particular.

CROSS-EXAMINATION.

X Q. 1—Are you an officer or director in the California and Oregon Land Company?

A—I am not, and never have been an officer or director in the California and Oregon Land Company.

X Q. 2—When did you become a stockholder in the said company?

A—I became a stockholder by issue to me of one thousand shares of the capital stock of said company on July 2, 1877. I subscribed to the articles of incorporation of the California and Oregon Land Company, and acknowledged the same on the 9th day of January, 1877. Stock was not then ready for issuance, and I did not actually receive my stock until June 2, 1877.

X Q. 3—When and from whom did you acquire any shares of stock that you may now hold in the same company?

A—I acquired and received my shares of stock direct from the company. Being an original purchaser of an undivided one-tenth in an undivided one-half of the grant, I joined in the deed to the corporation, and took in payment for my said interest one-twentieth of the entire capital stock which was the proportion my interest in the lands bore to the whole thereof.

X Q. 4—Prior to your acquiring said stock of the alleged purchase of the land grant in controversy herein, had you ever been in the State of Oregon, or seen said lands, or been over the alleged wagon road of the Oregon Central Military Road Company; if so, when was it?

A—Prior to acquiring said stock or making said purchase of said one-twentieth interest in the entire grant in controversy, I had never been in the State of Oregon, or seen any of said lands, nor had I been over said wagon road of the Oregon Central Military Road Company.

X Q. 5—What inquiry or research did you make, if any, before said alleged purchase and payment of the purchase price, to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act. State fully?

A—I heard the matter of purchase of the undivided one-half discussed somewhat in Sacramento by some of the parties who afterwards joined in the purchase. My attorney, Mr. Cadwalader, who was examining into the title for other parties, called my attention to it. I was in poor health at the time and could and did not give it much personal attention. I referred the whole matter to his opinion, and, as I have stated in my direct examination, on receiving a telegram from him at Cheyenne, en route to Europe, that the title was good and advising the purchase, I telegraphed him in reply to make the purchase for me, and provided him with the necessary funds to consummate. I was in no condition physically to undertake any research of title myself,

or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act; even if I had been competent otherwise to do so I would necessarily have employed an attorney to examine and report on the title, and I did employ Mr. Cadwalader, my attorney in other matters, to examine the same, and on his favorable report I purchased, by telegraphing him, as I have already stated.

X Q 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the governors of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grant or to the lands included therein?

A—I do not recollect whether I had ever, at that time, or prior to making my said purchase, seen or examined the alleged certificates of the Governor of Oregon that said wagon road had been built, or that I had seen or examined any abstract of title to said land grant, or the lands included therein. My impression is that I had not seen or examined anything of the kind. I referred the entire matter to my said attorney.

X Q 7—What part of the consideration for the purchase of said land grant was paid by you? How was it paid, and when?

A—Ten thousand dollars, and paid through our bank in Sacramento, known as the Banking House of D. O. Mills & Co., some time in May, 1874, and probably a draft was obtained for the amount. I have forgotten exactly how the money was drawn from the bank, but I paid ten thousand dollars to the bank on account of said purchase.

X Q 8—Will you swear that to your own personal knowledge all of your associates paid their proportion of such consideration?

A—I cannot swear, of my own personal knowledge, that all or any of my associates paid their proportion or any proportion of the consideration of the deed. I was en route to Europe at the time and could not have personal knowledge on the subject. I only know from hearsay that they paid their proportions.

X Q. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

A—This interrogatory is already answered by my answer to X Q. 7. I do not know who was present, nor the exact time or place when and where the money was paid. The bank books and my account therein would show the exact transaction, but they are in Sacramento, and I would have to send there for the exact data.

X Q. 10—You would not undertake to swear, would you, of your own personal knowledge, that your associates did not have any knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe that that said wagon road had not been built according to the granting acts?

A—In reply I can only say that I had no knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe that said wagon road had not been built according to the granting acts, nor do I believe that any of my associates had any such knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe that said wagon road had not been built according to the granting acts, nor that my attorney, Mr. Cadwalader, had any such knowledge, notice and so forth, otherwise they would not have become purchasers, nor would my attorney have advised me to make the purchase.

X Q. 11—Was G. W. Colby one of your associates in said purchase?

A—Mr. G. W. Colby was one of the associates in said purchase, as I found out afterwards—after the purchase was consummated. In fact, I did not know at the time, in Cheyenne, when I telegraphed Mr. Cadwalader that I would take one-tenth interest in the undivided one-half who all the other parties were. I did not know whether all or enough parties had been secured to complete the purchase or not.

X Q. 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete the said purchase?

A—I do not know whether Mr. Colby went to Oregon to complete the purchase or not. I was absent and had no direct or personal connection with the details of the purchase, and I do not know how it was actually consummated. All I know about it, is hearsay. I personally did not then know anything about Mr. Colby going to Oregon, and had nothing to do with sending him, if he went on that business.

X Q. 13—Will you undertake to swear that Mr. Colby did not have notice or information that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

A—I cannot testify as to what knowledge, notice or information Mr. Colby may have then had that said wagon road had not been built by said Oregon Central Military Road Company as required by said granting acts. All I can say is that there never was the slightest intimation given to me by Mr. Colby, or anyone else, that there was anything wrong or fraudulent or suspicious in any way about the land grant, or construction of the road, or that said grant could be any way defeated, or I would have had nothing to do with the purchase of any portion thereof.

X Q. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company? State fully what relations he had, if any, with said company?

A—I am informed by the present secretary of the company that Mr. Colby was never an officer or director in said California and Oregon Land Company; also that the articles of incorporation of the company show he subscribed and acknowledged the same on the 9th day of January, 1877, and that stock in the same was issued to him May 22, 1877. Other than the above I know of no other relation he ever bore to the company.

X Q. 15—Did you know of your own personal knowledge, what notice or information your associates might have had, or might not have had with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said

wagon road had not been built as required by the granting act?

A—I have no personal knowledge on the subject whatever.

EDGAR MILLS.

Subscribed and sworn to before me this 21st day of August, 1891.

L. S. B. SAWYER,
Commissioner, etc.

SAN FRANCISCO, August 21, 1891.

EXAMINATION-IN-CHIEF OF B. F. BAKER.

Q. 1—State your name, age, residence and occupation?

A—My name is Benjamin F. Baker, my age sixty-eight years, my residence Healdsburg, California, occupation mining.

Q. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

A—I am a stockholder therein, and have been since its organization.

Q. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

A—I am one of the original subscribers to the stock of that company.

Q. 4—Were you, or were you not, one of the purchasers of a tract of land granted by the Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2d, 1864, and afterwards granted by the State of Oregon, by an act of its legislature approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

A—I am one of the purchasers of said tract of land, under a deed dated October 15, 1874, from B. J. Pengra and wife to myself and others. I purchased an undivided two-twentieths interest in the undivided one-half of said lands.

Q. 5—If you answer that you were one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid, and whether the same was paid, and when and how.

A—Some time in the month of September, 1874, as well as I now recollect, my attention was called to the purchase of these lands by W. H. Parks, and I was solicited by him to take an interest in the purchase of an undivided half of the land grant, and upon his representations I then agreed with him to take a two-twentieths interest in said purchase. The total amount to be paid for said undivided one-half was one hundred thousand dollars, and the two-twentieths interest I agreed to take was to cost ten thousand dollars. Within a very few days thereafter I paid the ten thousand dollars to W. H. Parks in the city of Marysville, California, by a check on the Bank of Laporte, California. The payment was in advance of the date of the deed. I had confidence in the firm of Parks Brothers, then doing business in Marysville, of which said W. H. Parks was a member, and I entrusted him or his firm with the money, in full confidence they would obtain for me a deed for my said interest. I understood from Mr. Parks that others were to become interested in said purchase, and that the whole undivided half interest would be purchased, but I did not then know who the others would be. I was then residing in Sierra county, near Laporte, and engaged in mining, and I did not know that the transaction was consummated and deed delivered until some time afterwards.

Q. 6—At the time, or previous thereto, of the making of such purchase and the payment of the money and the delivery of the deeds thereof to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe, that there had been any fraudulent act or misrepresentations or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that the said road had not been constructed,

wholly, seasonably and properly, according to the granting acts.

A—Neither at the time of making said purchase, nor previous thereto, nor at the time of making said payment and delivery of said deed to myself and associates, did I, or any of my associates to my knowledge, have any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe that there there had been any fraudulent act or misrepresentations, or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that said road had not been constructed, wholly, seasonably and properly, according to the granting acts.

Q. 7—Had you or had you not, at or prior to the date of said purchase, the delivery to you and your associates of the deeds for said land, and the payment of the purchase price thereof, any knowledge, information, notice, suspicion, or ground of suspicion, or reason to suspect or believe, that any fraud had been practiced, or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, or agents, or stockholders, or by any other person or persons acting in its interest or its employ, or by any person or persons whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States to induce that officer to falsely issue patents for said land?

A—I had not, at or prior to the date of said purchase, the delivery of said deed, and the payment of said purchase price, any knowledge, information, notice, suspicion, or ground of suspicion, or reason to suspect or believe, that any fraud had been practiced, or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, agents, stockholders, or persons acting in its interest or employ, or by any person or persons

whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or to the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States to induce that officer to falsely issue patents for said land.

Q. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

A—We sold the same to the California and Oregon Land Company, a corporation formed under the laws of California, by deed, in the winter and early spring of 1877.

Q. 9—In answer to Interrogatory 8 you say that you conveyed said land to the California and Oregon Land Company, please state what, if any, notice, knowledge, information, suspicion, or ground to suspect, or reason to believe, the said California and Oregon Land Company, or any of its officers, or agents, or stockholders, or yourself, had at and prior to the conveyance to the said company by you and your associates of said lands, and the delivery of the deeds therefor, that there had been fraud or misrepresentations or failure of duty in the examination or certifying of the completion of said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said lands by the President of the United States?

A—I was one of the directors named in the articles of incorporation of the California and Oregon Land Company, and assisted in its organization; and neither at the time or prior to the conveyance to it I myself and my associates, or co-owners of our respective interests in said lands and the delivery of the deeds therefor to said corporation, did the said California and Oregon Land Company, or any of its officers or agents, or stockholders, to my knowledge, nor

did I myself, have any notice, knowledge, information, suspicion or ground to suspect, or reason to believe, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of said lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said land by the President of the United States.

Q 10—State what was the fact as to the purchase made by yourself and your associates of this land from the Oregon Central Military Road Company and the purchase thereof made by the California and Oregon Land Company from you, having been made in good faith without notice of any fraud whatever, and for value?

A—The purchase of my two-twentieths interest in the undivided one-half of said lands, in connection with my associates in said purchase, was not made from the Oregon Central Military Road Company, but from B. J. Pengra and wife, and the circumstances of my purchase are given in my answer to Interrogatory 5. I may add that I saw the abstract of title, containing the written opinion of Messrs. Mitchell & Dolph, attorneys, of Portland, Oregon, that the title was good. I saw a map of the road, or a large portion of the same, certified to by the Governor of Oregon, discussed the title and whole matter with Mr. W. H. Parks, who was then an owner in the grant and in whom I had great confidence, and upon whose advice, supported by my own judgment, I concluded to make and did make the purchase in good faith, and paid my money, ten thousand dollars, for my said interest, without any notice or suspicion of fraud of any kind whatever. Had I had the least suspicion of the title, or that the land grant had not been honestly earned, I would not have made the purchase. As to the purchase by the California and Oregon Land Company, that company was formed by the then owners of the land for the better and more convenient management of the property, and to avoid complications that might arise to the surviving

owners in case of the death of any of the owners, and we conveyed our interest to that corporation, taking in payment therefor such portions of its capital stock as we were respectively entitled in proportion to our respective interests in the lands; and our transfer to said corporation was made in entire good faith, without notice of any fraud whatever, and for value in its capital stock, as I have stated.

Q 11—State fully and at large any other fact within your knowledge and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

A—I know of no other fact material to the issue in this case, which would be of advantage to either party thereto.

CROSS-EXAMINATION.

X Q. 1—Are you an officer or director in the California and Oregon Land Company?

A—I am not now an officer or director in the California and Oregon Land Company. I was a director in said company for three years after its organization.

X Q. 2—When did you become a stockholder in the said company?

A—I was one of the subscribers to the capital stock, and signed and acknowledged the articles of incorporation of said company on the 9th day of January, 1877. The company issued stock to me, May 21, 1877, as I find upon reference to the books of said company.

X Q. 3—When and from whom did you acquire any shares of stock that you may now hold in the said company?

A—As just stated, I actually received my certificates of capital stock in said company on May 21, 1877. I then received a total of seven hundred and fifty shares—received or acquired them direct from the company—in its first issue of its capital stock. I had conveyed to the company by deed, jointly with the other owners of the record title, the two-twentieths interest in the undivided one-half purchased from Pengra and wife. Said interest in the lands were

equal to or the equivalent of a one-twentieth undivided interest in the whole, and that interest was equal to or equivalent to one-twentieth of the entire capital stock of said corporation, or one thousand shares thereof. But in making the original purchase of the two-twentieths interest in the undivided one-half, as above set forth, Mr. Orrin Gowell was concerned with me in said purchase. Mr. Gowell and myself were partners in certain matters at the time, and I took the record title in my name for our convenience, and it so remained until the issue of stock by the California and Oregon Land Company on said May 21, 1877, when our interests were segregated, and the company issued to me my seven hundred and fifty shares, which was my pro rata proportion of stock and the equivalent of my actual interest in the entire lands, and issued to Mr. Gowell a like pro rata proportion of stock for his interest.

X Q. 4—Prior to your acquiring said stock, or the alleged purchase of the land grant in controversy herein, had you ever been in the State of Oregon, or seen said lands, or been over the alleged wagon road of the Oregon Central Military Road Company; if so, when was it?

A—Prior to acquiring said stock, or the purchase of the said interest in the land grant in controversy, I had never been in the State of Oregon, or seen any of the lands, or been over over the wagon road of the Oregon Central Military Road Company.

X Q. 5—What inquiry or research did you make, if any, before said alleged purchase and payment of the purchase price, to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act. State fully?

A—Before making the purchase of said two-twentieths undivided interest in said undivided half of said lands in controversy, and before making said payment of ten thousand dollars therefor, I had several interviews with Mr. W. H. Parks in Marysville, California, on the subject. I was shown and examined closely the abstract of title, with the written opinion of Messrs. Mitchell & Dolph appended thereto that the title was perfect. I read therein the copies

of the certificates of the Governor of Oregon that the road had been constructed and the lands earned by the Oregon Central Military Road Company, and the certificate of the Commissioner of the General Land Office at Washington, stating that said certificates of the governor were on file in his office. I also ascertained from the abstract that over three hundred thousand acres of the lands had then been actually listed to said Oregon Central Military Road Company.

I knew from reading newspapers, and from other sources, that such grant had been made, and was recognized as valid by the officials of the government, and knowing Mr. W. H. Parks well, in fact intimately, and that he was largely interested in lands in California, and thoroughly conversant with land titles, and land matters generally, and placing reliance upon his advice, as well as the information that he had then purchased and was an owner in said land grant, and that the title to the same was good beyond any possible question—all these things, added to my own personal examination, and especially the copies of the official documents aforesaid contained in the abstract, as also a map of the road showing its location, and, to my recollection, certified to by the Governor of Oregon, which I also saw and examined at the same time I saw and examined the abstract, decided me to make the purchase, and I did so for myself and Mr. Gowell, in full confidence, and in good faith that the title was good, and that no question could ever be raised to defeat or impair it. Had I come to any other conclusion, or entertained the least doubt about it, I would not have made the purchase. What money Mr. Gowell and I had at the time we had made in mining in the mines of California, and we could ill afford to take chances in any speculative or doubtful enterprise.

X Q. 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the Governor of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grants or to the lands included therein?

A—As I have just stated, prior to said purchase I had seen and examined copies of the certificates of the Governors of Oregon that said wagon road had been built, as they were

a portion of said abstract of title which I saw and examined. I also saw a map of the line of said road, showing its location, and to the best of my recollection it was certified to in some manner, giving it the appearance and character of an official map, which I understood it to be. It was these official documents contained in the abstract, and the said map, that decided or determined my own judgment favorably to making the purchase.

X Q. 7—What part of the consideration for the purchase of said land grant was paid by you? How was it paid, and when?

A—I paid ten thousand dollars as our part of the consideration, for Mr. Gowell and myself. My recollection is that I gave a check for that amount to Mr. W. H. Parks in the city of Marysville, on the Bank of Laporte, but it is possible I mailed him the check from Laporte, directed to him at Marysville, California, where he then resided. It was some time in the latter part of September or the first of October, 1874. I cannot more distinctly state the time. The check was afterwards returned to me by the Bank of Laporte, and was destroyed.

X Q. 8—Will you swear that, to your own personal knowledge, all of your associates paid their proportion of such consideration?

A—I cannot swear from my own personal knowledge that all or any of my associates in the purchase of said undivided half of said lands paid their proportion, or any amount at all, of the consideration money named in the deed. As I have stated, I was in Sierra County, California, engaged in mining, and was not present at the payment of the money. I only know that I paid the ten thousand dollars as above specified, and, from hearsay, that my associates paid their respective amounts.

X Q. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

A—I have already stated to whom and how I paid the ten thousand dollars for the two-twentieths interest. It was to Mr. W. H. Parks, either personally to him in Marysville, Califor-

nia, or by mailing him a check for the same from Laporte, and no one was present at the time of such payment that I can remember. If I wrote the check in the store of Parks Bros., at Marysville, possible some of their clerks were present. I do not remember. If I wrote the check in the Bank of Laporte and placed it in a letter there, probably the cashier of that bank was present; I do not remember as to that. My impression, after so long a time, is that I sent the check in a letter to Mr. Parks from Laporte.

X Q. 10—you will not undertake to swear, will you, of your own personal knowledge, that your associates did not have any knowledge, notice or information, suspicion or grounds for suspicion, or reason to suspect or believe, that the said wagon road had not been built according to the granting acts?

A—No. I cannot swear of my own knowledge as to whether my associates may have had, or may not have had, any knowledge, notice or information, suspicion or grounds for suspicion, or reason to suspect or believe that the said wagon road had not been built according to the granting acts. At the time I made the purchase I did not know who those associates were. I did not know who they were until the purchase was made and the transaction completed.

X Q. 11—Was G. W. Colby one of your associates in said purchase?

A—I ascertained after the purchase was made and the deed obtained, that Mr. G. W. Colby was one of the associates in the purchase.

X Q 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete the said purchase?

A—Mr. Colby did not go to Oregon with my knowledge or consent to complete the said purchase. I knew nothing whatever about his going there for any such purpose. In fact, I knew nothing about the details or manner of making the purchase at all, or procuring of the deed, until same was obtained. I was at work in my mining claim, in the mountains of California, with no telegraph and poor mail facilities, and I knew nothing about the purchase, or how it was

completed, until some considerable time after the deed was obtained.

X Q. 13—Will you undertake to swear that Mr. Colby did not have notice or information that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

A—I cannot testify as to what, if any, notice or information Mr. Colby may have had that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts. All I can say is, that in all the conversations I ever had with Mr. Colby on the subject, he assured me the title to the land was good, that the wagon road had been built, and the lands earned according to the granting acts. In these statements he seemed honest and sincere, and I had no reason to doubt them.

X Q. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company. State fully what relation, if any, with said company?

A—Mr. Colby was never an officer or director in the California and Oregon Land Company, as I find upon examining the books of the company from May 22, 1877, to May 16, 1882. He had no other or different relation to the company than myself or any other stockholder that I ever knew or heard of.

X Q. 15—Did you know of your own personal knowledge what notice or information your associates might have had or might not have had with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said wagon road had not been built as required by the granting acts?

A—I did not know of my own personal knowledge what notice or information, if any, my associates, or any of them, may have had, or may not have had, with reference to the fraud charged in the bill in this case, or the defects in title of the Oregon Central Military Road Company, or that said wagon road had not been built as required by the granting acts. My belief is that they, like myself, were influenced by the abstract of title and maps submitted and opinions of

their respective attorneys that the title was good in all respects, and that we placed mutual confidence in each other, and joined in the purchase believing the investment to be entirely safe and eventually would prove profitable as the country became settled in which the lands were situated.

B. F. BAKER.

Subscribed and sworn to before me this 22d day of August, 1891.

L. S. B. SAWYER, Comr.

SAN FRANCISCO, August 21st, 1891.

EXAMINATION-IN-CHIEF OF M. P. JONES.

Q. 1—State your name, age, residence and occupation?

A—My name is M. P. Jones, my age sixty-one years, my residence San Francisco, California, occupation merchant.

Q. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

A—Stockholder.

Q. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

A—I am one of the original subscribers for the stock of said company.

Q. 4—Were you or were you not one of the purchasers of a tract of land granted by the Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2d, 1864, and afterwards granted by the State of Oregon by an act of its legislature, approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

A—I was.

Q. 5—If you answer that you were one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid, and whether the same was paid, and when and how?

A—In July or August this matter was presented to me by one Samuel More, he representing to me that the certain tract of land mentioned above, one-half of which had been previously sold to certain parties in San Francisco and other places, and the owners of the balance offered the other half for the same consideration as I understood the first half to have been sold for, to wit, one hundred thousand dollars. After making inquiry in regard to the matter, and having examined into the title and report of Mr. Dolph of Oregon, an attorney at law, who had acted for the purchasers of the first half of said land, and having referred said report of Mr. Dolph, and the abstract of title which accompanied said report, and also the certificate of the Governor of the State of Oregon in regard to the completion of the road, to my attorney in this city, William H. Sharp, for his opinion in regard to the legality and validity of the title, I concluded to make the purchase of a one-tenth part of the undivided one-half offered to me by the parties selling the previous one-half, and did so by paying to Samuel More the sum of ten thousand dollars, to be deposited in the Bank of California by Nicholas Luning, payable to the order of G. W. Colby.

Said payment was made September 29, 1874, it being understood that said purchase by me was to be consummated provided no liens or incumbrances had been made on the property since the purchase of the first half.

Q. 6—At the time, or previous thereto, of the making of such purchase and the payment of the money and delivery of the deeds thereof to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe, that there had been any fraudulent act or misrepresentations or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts?

A—In reply to that, all I can say is that there was no ground for suspicion of fraud or misrepresentations, or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably, and properly, according to the granting acts; for if I had known of any such thing, I certainly should not have made the purchase.

Q. 7—Had you, or had you not, at or prior to the date of said purchase, the delivery to you and your associates of the deeds for said land, and the payment of the purchase price thereof, any knowledge, information, notice, suspicion or ground of suspicion, or reason to suspect or believe that any fraud had been practiced, or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, or agents, or stockholders, or by any other person or persons acting in its interest or in its employ, or by any person or persons whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States, to induce that officer to falsely issue patents for said lands?

A—I had no such information.

Q. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

A—We conveyed it to the California and Oregon Land Company.

Q. 9—If, in answer to Interrogatory 8, you say that you conveyed said land to the California and Oregon Land Company, please state what, if any notice, knowledge, information, suspicion or ground to suspect, or reason to believe, the said California and Oregon Land Company, or any of its officers, or agents or stockholders, or yourself, had at and prior to the conveyance to the said company by you and

your associates of said lands, and the delivery of the deeds therefor, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior or the Commisioner of the General Land Office, or issuing of patents for any of said land by the President of the United States?

A—I had no notice, knowledge, information, suspicion or ground to suspect, or reason to believe, that the said California and Oregon Land Company, or any of its officers, agents or stockholders, had any knowledge that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of its land by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said land by the President of the United States?

Q. 10—State what was the fact as to the purchase made by yourself and your associates of this land from the Oregon Central Military Road Company, and the purchase thereof made by the California and Oregon Land Company from you, having been made in good faith, without notice of any fraud whatever, and for value?

A—Said purchase was made in good faith, without notice of any fraud whatever, and for a valuable consideration.

Q. 11—State fully and at large any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

A—I would like to say that in making the said purchase I used all the precaution possible to obtain the facts as to the validity of the title to the said land that any business man

would do in any other matter where a large amount of money was involved, and had I not been satisfied that everything in connection with the matter was perfectly correct and honest I should certainly not have made the purchase.

CROSS-EXAMINATION.

X Q. 1—Are you an officer or director in the California and Oregon Land Company?

A—I am a director.

X Q. 2—When did you become a stockholder in the said company?

A—At the time of the organization of said company.

X Q. 3—When and from whom did you acquire any shares of stock that you may now hold in the said company?

A—When the corporation was organized my original interest was represented by one thousand shares of the capital stock of the company, which I received at that time. Later on, a few years after, I purchased other stock at different times from Mr. D. H. Holbrook and others, and I hold at the present time two thousand three hundred and fifty shares.

X Q. 4—Prior to your acquiring said stock, or the alleged purchase of the land grant in controversy herein, had you ever been in the State of Oregon, or seen said lands, or been over the alleged wagon road of the Oregon Central Military Road Company, if so when was it?

A—Prior to my acquiring said stock, or the alleged purchase of the land grant in controversy herein, I had never been in the State of Oregon, or seen said lands, or been over the alleged wagon road of the Oregon Central Military Road Company.

X Q. 5—What inquiry or research did you make, if any, before said alleged purchase and the payment of the purchase price, to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act. State fully?

A—I ascertained by examination of the report of Mr. Dolph, attorney at law, who examined said title for the purchasers of the previous one-half which was sold, and also examined the abstract and report, including the certificate of the governor of Oregon certifying to the completion of the road, and, being satisfactory to me, after referring it also to my attorney, William H. Sharp, I concluded to make the purchase.

X Q. 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the governor of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grant or to the lands included therein?

A—I will reply to that by saying, as stated above in answer to Interrogatory 5, that I had seen and examined said abstract and certificate.

X Q. 7—What part of the consideration for the purchase of said land grant was paid by you? How was it paid and when?

A—A tenth part of one hundred thousand dollars was paid by me for the purchase of the last half of said land, to wit, ten thousand dollars. It was paid by me by a check given to Samuel More to be deposited in the Bank of California by Nicholas Luning, one of the parties to this purchase, payable to the order of G. W. Colby.

X Q. 8—Will you swear that to your own personal knowledge all of your associates paid their portion of such consideration?

A—I cannot swear to my personal knowledge, but am satisfied they did, having no reason to doubt it.

X Q. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

A—I paid it to Samuel More, either in my office or in the office of said More. I do not recollect any one being present at the time.

X Q. 10—You will not undertake to swear, will you, of your own personal knowledge, that your associates did not

have any knowledge, notice or information, suspicion or ground for suspicion, or reason or suspect or believe that the said wagon road had not been built according to the granting acts?

A—I have no reason to think, and neither do I believe that they had any such knowledge that said road had not been built according to the granting acts.

X Q. 11—Was G. W. Colby one of your associates in said purchase?

A—He was.

X Q. 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete said purchase?

A—Mr. Colby went to Oregon to see that no changes had been made in the title to the property since the purchase of the first half; that is to say, to see that no liens or other incumbrances had been placed upon said property since said first purchase.

X Q. 13—Will you undertake to swear that Mr. Colby did not have notice or information that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

A—I do not think he had such notice. I have no reason to believe that he did. He did not go up there for that purpose, but merely went up there in our interest to see that no liens or other incumbrances had been placed upon said land since the purchase of the first half of the land in controversy had been made, as the title had been fully examined by the parties making the first purchase, and which we relied upon for the validity of the title of the part that we purchased.

X Q. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company? State fully what relation he had, if any, with said company?

A—He was a stockholder, but not a director or other officer, at any time in said California and Oregon Land Company, but merely had the same relation to the company as any other stockholder.

X Q. 16—Did you know of your own personal knowledge what notice or information your associates might have had, or might not have had with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said wagon road had not been built as required by the granting act?

A—I had no knowledge, nor do I think that any of my associates had, of any fraud charged in the bill in this case, or any in the title of said Oregon Central Military Road Company, or that said wagon road had not been built as required by the granting act, for, as I said before, in answer to previous interrogatories, I certainly should not have purchased had I known of any such fraud, and knowing many of the purchasers from said Oregon Central Military Road Company to be careful business men, I do not think it possible that they had any such knowledge, for if they had they would not have made the purchase.

Saturday, August 22, 1891.

The witness appeared this day by appointment with the Commissioner, and after having read over his deposition stated that he would not sign the same to-day, but would refer to some documents in his possession, and other data, in order to refresh his memory, and would, on Monday, 24th instant, appear and again read over his deposition and make such corrections as he desired, and then sign the same.

Monday, August 24th, 1891.

The witness appeared this day, as per appointment made on the 22nd instant, above noted, and made the following corrections in his deposition, to wit:

My answer to Interrogatory 2 I wish to correct to read as follows: Stockholder and director.

My answer to Interrogatory 5 I wish to add, before the word Dolph on line 10 of page 33, the words "Mitchell &."

On line 13, same page, I wish to add the words "Mitchell &" before the word "Dolph."

On line 16, same page, after the words "William H. Sharp," I wish to add the words "since deceased."

In my answer to Interrogatory 10 I wish to add the following: Military Road Company; my deed came through B. J. Pengra and wife, and the sale to the California and Oregon Land Company was for the purpose of organizing under said name so as to more easily handle the property of our company, and avoid any trouble that might be occasioned by a death of any member of our company.

My answer to Cross-interrogatory 3 I wish to correct so as to read as follows:

When the corporation was organized my original interest was represented by one thousand shares of the capital stock of the company, which I received at that time. At the same time I received five hundred shares of said capital stock in lieu of the one-twentieth interest which I purchased of C. H. Holbrook and wife on January 4th, 1876. Later on I purchased other stock at different times, and I hold at the present time two thousand three hundred and fifty shares.

To my answer to Cross-interrogatory 5 I wish to add the words "Mitchell &" before the word "Dolph" on line 14 of page 38.

Also, after the words "William H. Sharp," on line 19 of said page, the words "now deceased."

M. P. JONES.

Subscribed and sworn to before me, this 25th day of August, 1891.

L. S B. SAWYER,
Commissioner, etc.

SAN FRANCISCO, August 22nd, 1891.

EXAMINATION-IN-CHIEF OF C. H. HOLBROOK.

Q. 1—State your name, age, residence and occupation?

A—My name is Charles H. Holbrook, my age forty-four years, residence San Francisco, California, occupation lumberman.

Q. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

A—None.

Q. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

A—I am not.

Q. 4—Were you, or were you not, one of the purchasers of a tract of land granted by the Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2nd, 1864, and afterwards granted by the State of Oregon, by an act of its legislature approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

A—I was.

Q. 5—If you answer that you were one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid, and whether the same was paid, and when and how?

A—I purchased an undivided one-twentieth interest in an undivided one-half of said grant by deed dated October 15th, 1874, from B J. Pengra and wife. I paid therefor the sum of six thousand two hundred and fifty dollars cash to N. D. Rideout, who was a co-purchaser also of an interest in the same deed, and paid the money a short time prior to the date of the deed. I cannot now state the exact date of the payment.

Q. 6—At the time, or previous thereto, of the making of such purchase and the payment of the money and the delivery of the deeds thereof to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe that there had been any fraudulent act or misrepresentations or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2nd, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts?

A—No. Neither myself nor any of my associates, to my knowledge, had any such knowledge, notice or information, or suspicion, as is mentioned in the question. On the contrary, I believed, and so far as I know all my associates believed, it was a perfectly square and straightforward transaction, and nothing whatever wrong, fraudulent or suspicious about it. If I had thought otherwise I would not have made the purchase. No, not the least on my part, nor on that of my associates to my knowledge.

Q. 7—Had you, or had you not, at or prior to the date of said purchase, the delivery to you and your associates of the deeds for said land, and the payment of the purchase price thereof, any knowledge, information, notice, suspicion or ground of suspicion, or reason to suspect or believe that any fraud had been practiced, or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers or agents or stockholders, or by any other person or persons acting in its interest or in the employ or by any person or persons whomsoever, to the Governor of the State of Oregon, to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior or the Commissioner of the General Land Office, to induce them, or either of them, to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States, to induce that officer to falsely issue patents for said land?

A—I had not.

Q. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

A—I do not know of my own knowledge what disposition my associates made of their several interests in said purchase. I sold my said interest in said lands to M. P. Jones by deed dated January 4th, 1876, and since that time have had no interest of any kind in the same.

Q. 9—If, in answer to Interrogatory 8, you say that you conveyed said land to the California and Oregon Land Company, please state what, if any, notice, knowledge, informa-

tion, suspicion or ground to suspect or reason to believe the said California and Oregon Land Company, or any of its officers or agents or stockholders or yourself had at and prior to the conveyance to the said company by you and your associates of said lands and the delivery of the deeds therefor, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road or the listing of any part of lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said land by the President of the United States?

A—As I never had any interest in the corporation known as the California and Oregon Land Company, I have no knowledge on the subject.

Q. 10—State what was the fact as to the purchase made by yourself and your associates of this land from the Oregon Central Military Road Company and the purchase thereof made by the California and Oregon Land Company from you having been made in good faith, without notice of any fraud whatever, and for value?

A—As I stated in answer to Interrogatory 5, myself and associates purchased of B. J. Pengra and wife, by deed dated October 15th, 1874, an undivided one-half interest in said land grant. My interest conveyed to me in said deed was an undivided one-twentieth of the said undivided one-half. My purchase was made in perfect good faith, without notice of any fraud whatever and for value, six thousand two hundred and fifty dollars in cash. I did not sell to the California and Oregon Land Company, but to M. P. Jones, before the organization of said corporation. I sold my interest to said Jones for seven thousand dollars gold coin.

Q. 11—State fully and at large any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

A—I know no other fact material to the issue which would be of advantage to either party hereto.

CROSS-EXAMINATION.

X Q. 1—Are you an officer or director in the California and Oregon Land Company?

A—I am not.

X Q. 2—When did you become a stockholder in the said Company?

A—I never had or owned any stock in said company.

X Q. 3—When and from whom did you acquire any shares of stock that you may now hold in the said company?

A—I never acquired or held any stock in said company.

X Q. 4—Prior to your acquiring said stock, or the alleged purchase of the land grant in controversy herein had you ever been in the State of Oregon, or seen said lands, or been over the alleged wagon road of the Oregon Central Military Road Company, if so when was it?

A—Prior to the purchase of my said one-twentieth interest in said undivided one-half of the lands in controversy I had never been in the State of Oregon, nor seen the lands or wagon road of the Oregon Central Military Road Company.

X Q. 5—What inquiry or research did you make, if any, before said alleged purchase and payment of the purchase price to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act? State fully.

A—I did not make any search of title myself. I was then residing in Chico, California. Mr. Colby first called my attention to the purchase, and named several parties already interested in the grant as having purchased one-half thereof and about to become purchasers of the other or remaining undivided one-half. He named, among others, John Boggs, E. B. Pond, N. D. Rideout, N. Luning, Isaac Allen, W. C. Belcher and W. H. Parks as interested or about to become interested in said purchase. I knew all these gentlemen very well as gentlemen of wealth and high

standing in the State, and as prudent, cautious, business men. Mr. Colby showed me a map of the road which, to the best of my recollection, was a tracing made from some official map of said road, and assured me the road was completed and the title was good. I then discussed the matter with Mr. Parks, Mr. Belcher, Mr. Pond and Mr. Rideout, and, on their assurance that they believed the investment a good one and the title good, and that so believing that they were going to invest, I finally concluded to purchase said interest, and made arrangements with the Bank of Butte County at Chico to pay Mr. Rideout the six thousand two hundred and fifty dollars to pay for my said interest, as he was about to go to San Francisco to make a deposit in payment for his own and Mr. Allen's purchase in the same undivided one-half.

X Q. 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the governors of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grant or to the lands included therein?

A—I had not.

X Q. 7—What part of the consideration for the purchase of said land grant was paid by you, how was it paid, and when?

A—As before stated, I paid six thousand two hundred and fifty dollars in cash for my said interest in said lands. I paid it through the Bank of Butte County, Chico, where I then did my banking business, to N. D. Rideout, and about the first of October, 1874, for him to take to San Francisco and conclude the purchase for himself, Mr. Allen and myself.

X Q. 8—Will you swear that to your own personal knowledge all of your associates paid their proportion of such consideration?

A—I can only testify as to my own payment and that of Mr. Allen. Mr. Allen paid six thousand two hundred and fifty dollars for his undivided one-twentieth at the same time I made my payment.

X Q. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

A—As already stated, I paid my part to Mr. N. D. Rideout in the "Bank of Butte County," at Chico, and Mr. Rideout and Mr. Allen were present at the time, and also Mr. Charles Faulkner, then and now cashier of that bank. It was then and there arranged and agreed between Mr. Rideout, Mr. Allen and myself that Mr. Rideout should take the money of Mr. Allen and myself, together with his own, and conclude the purchase of our respective interests, in San Francisco.

X Q. 10—You will not undertake to swear, will you, of your personal knowledge, that your associates did not have any knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe, that the said wagon road had not been built according to the granting acts?

A—No, but I do swear that I believe that every one of those gentlemen whose names are mentioned in the deed of October 15, 1874, for said undivided one half of said lands, and that I believed that the road had been built, and that the title, as represented to them and myself, was in perfect order, and without fraud or suspicion whatever.

X Q. 11—Was G. W. Colby one of your associates in said purchase?

A—He was.

X Q. 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete the said purchase?

A—On Mr. Rideout's return to Chico from San Francisco he stated to myself and Mr. Allen that the purchasers had sent Mr. Colby to Oregon to see that no liens or incumbrances, or judgments against the land, had been filed since the date of the abstract. That is the only purpose I ever heard or knew of for which Mr. Colby went to Oregon in the matter.

X Q. 13—Will you undertake to swear that Mr. Colby did not have notice or information that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

A—If he had any such information I knew nothing of it.

X Q. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company? State fully what relation he had, if any, with said company.

A—I do not know. I sold out my interest before said company was organized, and have had no interest in it since.

X Q. 15—Did you know of your own personal knowledge what notice or information your associates might have had, or might not have had, with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said wagon road had not been built as required by the granting act?

A—No. I had no knowledge whatever on the subject.

C. H. HOLBROOK.

Subscribed and sworn to before me this 22d day of August, 1891.

L. S. B. SAWYER,
Commissioner, etc.
SAN FRANCISCO, August 22, 1891.

EXAMINATION-IN-CHIEF OF ROBERT HAMILTON.

Q. 1—State your name, age, residence and occupation.

A—My name is Robert Hamilton, my age is sixty-three years, my residence San Francisco, California, my occupation wholesale merchant, one of the firm of Baker & Hamilton.

Q. 2—Are you, or are you not, a stockholder in the California and Oregon Land Company, one of the defendants in this suit?

A—The firm of Baker & Hamilton, of which I am a member, owns six hundred and sixty-six and two-thirds shares of the capital stock of that company.

Q. 3—If you answer yea, please state when you became such stockholder?

A—In the month of November, 1874, myself and James Carolan of San Francisco purchased an undivided one-twentieth of the grant of lands involved in this action from G. W. Colby, and paid him therefor fifteen thousand dollars in cash. At the time he gave his individual deed to us, but subsequently we discovered that under the laws of Oregon it was requisite that a wife should join with her husband in a conveyance of real estate, and in the month of February, 1875, George W. Colby and wife joined in a deed to us for the interest in said lands sold to us in November preceding. I am a member of the firm of Baker & Hamilton, consisting of L. L. Baker and myself. It was understood at the time of our purchase from Colby that my partner L. L. Baker should have an equal one-third interest in the purchase with Mr. Carolan and myself, if on his return from New York, where he then was, he should desire to share with us in the purchase. On his return, several months after, he decided to join us in the purchase, and paid his proportion of the purchase money. The title, however, was allowed to stand in the name of Mr. Carolan and myself until the organization of the defendant, the California and Oregon Land Company, in 1877, when Mr. Carolan and myself conveyed the said interest standing in our names to that corporation, and by our direction that corporation issued to our firm, Baker & Hamilton, six hundred and sixty-six and two-thirds shares of its capital stock, and to James Carolan three hundred and thirty-three and one-third shares, which was our pro rata proportions respectively of said capital stock, according to our interest in said lands. We have held said six hundred and sixty-six and two-thirds shares ever since, and still hold the same.

Q. 4. Please state whether or not at the time you became such stockholder, or at any time prior thereto, you had any notice, knowledge, information, suspicion or reason to suspect or believe that any fraud had been practiced upon or any misrepresentations made to the Governor of Oregon by any officer of the defendant, the Oregon Central Military Road Company, or any of its stockholders or agents, or persons in its employ, or by any person or persons whomsoever, to falsely induce said Governor to certify that the wagon

road described in the act of Congress of July 2d, 1864, and mentioned in the bill of complaint, had been duly and seasonably constructed, as required by said act?

A—Neither at the time of our purchase from Colby, nor at the time we became stockholders in the California and Oregon Land Company, nor at any time prior thereto, did we have any notice, knowledge, information, suspicion or reason to suspect that any fraud whatever had been practiced upon or any misrepresentations made to the Governor of Oregon by any officer of the defendant, the Oregon Central Military Road Company, or by any of its stockholders or agents, or persons in its employ, or by any person or persons whomsoever, to induce said Governor to falsely certify that the wagon road described in the act of Congress of July 2d, 1864, and mentioned in the bill of complaint, had been duly and seasonably constructed as required by said act; nor that in respect of the construction of said road, or of the Governor's certificate that it had been constructed, any fraud whatever had been practiced, or any misrepresentations made by any person or persons whomsoever.

Q. 5—In what does the properties of the California and Oregon Land Company consist?

A—It consists of lands and a few small items of personal property.

Q. 6—If, in answer to the last preceding interrogatory, you say "lands," please state what lands?

A—The lands granted by the Congress of the United States to the State of Oregon to aid in the construction of a military road from Eugene City, Oregon, to the eastern boundary of said State, and by the State of Oregon granted to the Oregon Central Military Road Company, and by said Oregon Central Military Road Company to B. J. Pengra, and by said Pengra and wife to G. W. Colby and others, and by these latter to the defendant, the California and Oregon Land Company.

Q. 7—If, in answer to the last preceding interrogatory, you say "lands granted by the Congress of the United States to the State of Oregon," please state upon what you relied,

if anything, in making purchase of the stock of the California and Oregon Land Company, as evidence that the land had been duly earned, and that the title was in the California and Oregon Land Company?

A—In the month of November, 1875, Mr. George W. Colby proposed to sell to Mr. Carolan and myself an undivided one-twentieth interest in the lands referred to in the preceding answer, for fifteen thousand dollars, and at the time handed us an abstract of the title, to which was appended the written opinion of Messrs. Mitchell & Dolph, eminent attorneys at law of Portland, Oregon, that the title was good, and also a map, certified by the governor of Oregon, showing the definite location and completion of the road. The abstract contained certificates of Governors Gibbs and Wood of Oregon, and of the United States Commissioner of the General Land Office at Washington, showing that the road had been completed. We submitted said abstract and map to our attorney, Mr. George Cadwalader, of Sacramento, California, who, after due examination of the same, reported to us that the land had been earned, and that the title was good, and thereupon we made the purchase. In making this purchase we relied entirely upon the abstract and map, and opinion of our attorney, that the title was good. At the time of the organization of the California and Oregon Land Company we conveyed our interest in the land to that company, and received therefor the same proportion of the capital stock of that company that our interest in the land bore to the whole.

Q. 8—State fully and at large any other fact within your knowledge, and material to the issue joined in this suit, which would be of advantage to either party hereto, as fully as though particularly interrogated concerning the same?

A—I know of no other fact material to the issue joined.

CROSS-EXAMINATION.

X Q. 1—How many shares of stock, if any, did you own or hold in the California and Oregon Land Company, and when and how did you acquire the same?

A—The firm of Baker & Hamilton, composed of L. L. Baker and myself, owns six hundred and sixty-six and two-

thirds shares of the capital stock of the California and Oregon Land Company, which were issued to us soon after the organization of the company, and in the original issue of its stock, in consideration of the conveyance to it of our interest in the land granted by the acts of Congress. As I have stated in my direct examination, James Carolan and myself were the grantees named in the deed from George W. Colby and wife, but Mr. Baker paid one-third of the purchase money, and when the stock of the California and Oregon Land Company was issued to us for the interest in the land conveyed to us by Colby and wife, six hundred and sixty-six and two-thirds shares were issued to Baker & Hamilton, and three hundred and thirty-three and one-third shares to James Carolan.

X Q. 2—Are you an officer or director in said company?

A—I am not, and never was an officer in the company.

X Q. 3—Who did you acquire said stock from?

A—In my answer to the first cross interrogatory I have answered fully.

X Q. 4—Prior to the time you acquired said stock, had you ever been in the State of Oregon, or examined the land grant in controversy in this suit, or been over or seen the road of the said Oregon Central Military Road Company?

A—I had never been in the State of Oregon prior to the issue of the said stock to us, nor examined the lands in controversy, or been over or seen the road of the said Oregon Central Military Road Company.

X Q. 5—Did you make any inquiry or research to find out, or to satisfy yourself as to the condition of the lands included in said grant, or the title thereto, or as to whether or not the said road had been duly or seasonably constructed, as required by law; if so, state what they were?

A—The only research or inquiry that I made as to the condition of the lands included in the grant, or the title thereto, or as to the construction of the road, was an examination of the abstract of title and the map to which I have referred in my direct examination, which I examined myself and caused also to be examined by my attorney, Mr. Cadwalader, who reported favorably as to the title.

X Q. 6—Prior to the time you acquired said stock in the California and Oregon Land Company, did you ever see the certificates, or alleged certificates, of the governors of Oregon, that said road had been built; if so, who showed such certificates, when was it, and who else was present?

A—I had never seen the original certificates of the governors of Oregon certifying that the road had been built, but I had seen the copies of such certificates contained in the abstract of title and with them an original certificate of the Commissioner of the General Land Office, at Washington, to the effect that the road had been completed. This abstract containing these certificates was shown me by G. W. Colby, from whom I purchased in the month of November, 1874. I think Mr. Carolan and myself were the only persons present, besides Mr. Colby, at the time he handed us the abstract and map.

ROBERT HAMILTON.

Subscribed and sworn to before me, this 24th day of August, 1891.

L. S. B. SAWYER,
Commissioner, etc.

SAN FRANCISCO, August 22d, 1891.

EXAMINATION-IN-CHIEF OF LIVINGSTON L. BAKER.

Q. 1—State your name, age, residence and occupation?

A—My name is Livingston L. Baker, my age sixty-four years, residence San Francisco, California, and occupation wholesale merchant, being one of the firm of Baker & Hamilton.

Q. 2—Are you or are you not a stockholder in the California and Oregon Land Company, one of the defendants in this suit?

A—The firm of Baker & Hamilton, of which I am a member, owns six hundred and sixty-six and two-thirds shares of the capital stock of the California and Oregon Land Company, defendant in this suit.

Q. 3—If you answer yea, please state when you became such stockholder?

A—During my absence in the city of New York in the month of November, 1874, my partner, Robert Hamilton, in

connection with James Carolan purchased of G. W. Colby a one-twentieth interest undivided in the grant of lands involved in this action for the sum of fifteen thousand dollars cash, or short note for my part. On my return to California a few months after their purchase they informed me of the same, and gave me the option of joining them equally in the purchase. I accepted, and paid my proportional one-third, or five thousand dollars. They had taken a deed from Colby and wife to themselves for said one-twentieth undivided interest, and the title remained in them until the organization of the California and Oregon Land Company, when they deeded the same to the company. When the capital stock of the California and Oregon Land Company was ready to be issued I received for our firm, Baker & Hamilton, six hundred and sixty-six and two-thirds shares of said capital stock, and Mr. James Carolan received three hundred and thirty-three and one-third shares of the same, making a total of one thousand shares, or one-twontieth of the whole capital stock. The firm of Baker & Hamilton still owns said six hundred and sixty-six and two-thirds shares of stock, and it was first issued to the firm on May 22d, 1877.

Q. 4—Please state whether or not at the time you became such stockholder, or at any time prior thereto, you had any notice, knowledge, information, suspicion or reason to suspect or believe that any fraud had been practiced upon, or any misrepresentations made to the Governors of Oregon, by any officer of the defendant, the Oregon Central Military Road Company, or any of its stockholders or agents, or persons in its employ, or by any person or persons whomsoever, to falsely induce said governor to certify that the wagon road described in the act of Congress of July 2d, 1864, and mentioned in the bill of complaint, had been duly and seasonably constructed, as required by said act?

A—Neither at the time our firm became such stockholder, nor at any time prior thereto, did I have any notice, knowledge, information, suspicion or reason to suspect or believe that any fraud had been practiced upon, or any misrepresentation made to the Governor of Oregon by any officer of the defendant, the Oregon Central Military Road Company, or any of its stockholders or agents or any person in its

employ, or by any person or persons whomsoever, to falsely induce or to induce said governor to certify that the wagon road described in the act of Congress of July 2, 1864, and mentioned in the bill of complaint, had been duly and seasonably constructed as required by said act. Nor did I know, nor had I ever heard from any source whatever, that, with regard to the construction of said road, or said governors' certificates that it had been constructed, any fraud whatever had been practiced, or any misrepresentation made by any person whomsoever. Had I known, or heard, or had cause to suspect any such thing, I would not have joined in said purchase.

Q. 5—In what does the properties of the California and Oregon Land Company consist?

A—Principally of lands in the State of Oregon, and some small personal assets.

Q. 6—If in answer to the last preceding interrogatory you say "lands," please state what lands?

A—Lands granted by the Congress of the United States to the State of Oregon by the act of Congress of July 2nd, 1864.

Q. 7—If in answer to the last preceding interrogatory you say "lands granted by the Congress of the United States to the State of Oregon," please state upon what you relied, if anything, in making purchase of the stock of the California and Oregon Land Company, as evidence that the land had been duly earned, and that the title was in the California and Oregon Land Company?

A—In making the purchase, that is to say in deciding to join my partners Robert Hamilton and James Carolan, equally, in the purchase of the undivided one-twentieth interest from G. W. Colby, which purchase they had made during my absence in New York, I relied entirely upon their statements to me of the examination of title they had caused to be made by our attorney, Mr. George Cadwalader, and his favorable report thereon, and upon the fact that they were fully satisfied with the title and purchase, and had invested therein.

Q. 8—State fully and at large any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

A—I know of no other fact material to the issue in this suit.

CROSS-EXAMINATION.

X Q. 1—How many shares of stock, if any, did you own or hold in the California and Oregon Land Company, and when and how did you acquire the same?

A—As stated in my answer to direct interrogatory 3, the firm of Baker & Hamilton, of which I am a member, has owned, since the organization of the California and Oregon Land Company, six hundred and sixty-six and two-thirds shares of its capital stock, and still owns the same. The stock was issued to the firm on May 22nd, 1877. It was acquired in this way: my partner, Robert Hamilton, and James Carolan, in November, 1874, purchased an undivided one-twentieth interest from George W. Colby in the land grant involved in this action for the sum of fifteen thousand dollars cash, with the understanding between Mr. Hamilton and Mr. Carolan that I should be permitted to join equally with them in said purchase if I should so desire on my return from New York, where I then was. On my return I decided to make, and did make, the purchase, and paid my five thousand dollars. The title to the one-twentieth interest remained in Mr. Hamilton and Mr. Carolan under a deed they had procured from G. W. Colby and wife, until the organization of the California and Oregon Land Company, when it was conveyed to that corporation, and when the corporation was ready to issue its stock we received our pro rata proportion thereof in payment for said deed. The firm of Baker & Hamilton took six hundred and sixty-six and two-thirds shares and James Carolan took three hundred and thirty-three and one-third shares. The total one thousand shares bore the same relation to the entire capital stock of the corporatien that the one-twentieth interest in the grant purchased of Colby and wife bore to the whole thereof.

X Q. 2—Are you an officer or director of said company?

A—I am not now, and have never been, an officer or director in said company.

X Q. 3—Who did you acquire said stock from?

A—I think I have fully answered in my reply to Cross-interrogatory 1. I could only repeat the same answer in answer to this question.

X Q. 4—Prior to the time you acquired said stock, had you ever been in the State of Oregon, or examined the land grant in controversy in this suit, or been or seen the road of the said Oregon Central Military Road Company?

A—Prior to the time our firm acquired the said stock I had never been in the State of Oregon, and of course had never seen or examined the land grant in controversy in this suit, nor seen or examined the road of said Oregon Central Military Road Company.

X Q. 5—Did you make any inquiry or research to find out, or to satisfy yourself, as to the condition of the lands included in said grant, or the title thereto, as to whether or not the said road had been duly or seasonably constructed, as required by law? If so, state what they were.

A—I made no inquiry or research to find out and satisfy myself as to the condition of the lands included in the grant or the title thereto, or as to whether said road was duly or seasonably constructed, other than from my partner Mr. Hamilton and Mr. Carolan, who assured me they had fully investigated the same and had obtained the opinion of our attorney, Mr. George Cadwalader, that the title was good in every particular. In fact, they were so well satisfied and assured that the title was perfect and the investment a good one that they paid five thousand dollars more for the one-twentieth interest than Mr. Colby had paid for the same interest, or than any of the original purchasers had paid for a like interest.

X Q. 6—Prior to the time you acquired said stock in the California and Oregon Land Company, did you ever see the certificates, or alleged certificates, of the Governors of Oregon that said road had been built? If so, who showed such certificates, when was it, and who else was present?

A—I did not see the certificates, or alleged certificates, of the Governors of Oregon that said road had been built, prior to our purchase of said one-twentieth interest or the issue of said stock to our firm by said corporation. I relied entirely upon the statements of my partner, Mr. Hamilton, of Mr. Carolan, and the opinion of our attorney, Mr. Cadwalader, who reported that they had seen and examined all matters of title and found them correct, and that the title was good.

L. L. BAKER.

Subscribed and sworn to before me this 24th day of August, 1891.

L. S. B. SAWYER,
Commissioner, &c.

SAN FRANCISCO, August 22nd, 1891.

EXAMINATION-IN-CHIEF OF JAMES CAROLAN.

Q. 1—State your name, age, residence and occupation?

A—My name is James Carolan, my age sixty-three years, residence San Francisco, California, occupation wholesale merchant. I am one of the firm of Carolan & Co. in San Francisco.

Q. 2—Are you, or are you not, a stockholder in the California and Oregon Land Company, one of the defendants in this suit?

A—I am a stockholder in said company.

Q. 3—If you answer yes, please state when you became such stockholder?

A—I signed and acknowledged the articles of incorporation of said California and Oregon Land Company on the 9th day of January, 1877, and also subscribed then to its capital stock. The actual certificates of stock in said corporation were issued to me on May 18, 1877.

Q. 4—Please state whether or not, at the time you became such stockholder, or at any time prior thereto, you had any notice, knowledge, information, suspicion or reason to suspect or believe, that any fraud had been practiced upon, or any misrepresentations made to the governor of Oregon, by any officer of the defendant, the Oregon Central

Military Road Company, or any of its stockholders or agents, or persons in its employ, or by any person or persons whomsoever, to falsely induce said governor to certify that the wagon road described in the act of Congress of July 2nd, 1864, and mentioned in the bill of complaint, had been duly and seasonably constructed as required by said act?

A—At the time I became such stockholder, nor at any time prior thereto, did I have any notice, knowledge, information, suspicion or reason to suspect or believe, that any fraud had been practiced upon, or any misrepresentations made to the governor of Oregon by any officer of the defendant, the Oregon Central Military Road Company, or any of its stockholders or agents, or persons in its employ or by any person or persons whomsoever, to falsely induce said governor to certify that the wagon road described in the act of Congress of July 2, 1864, and mentioned in the bill of complaint, had been duly and seasonably constructed as required by said act.

Q. 5—In what does the properties of the California and Oregon land Company consist?

A—Principally in lands in the State of Oregon, and some personal assets of no great amount.

Q. 6—If, in answer to the last preceding interrogatory, you say "lands," please state what lands?

A—Lands granted by the Congress of the United States to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State.

Q. 7—If, in answer to the last preceding interrogatory you say "lands granted by the Congress of the United States to the State of Oregon," please state upon what you relied, if anything, in making purchase of the stock of the California and Oregon Land Company, as evidence that the land had been duly earned, and that the title was in the California and Oregon Land Company?

A—My attention was first called to the purchase of an interest in these lands by Mr. Robert Hamilton, of the firm of Baker & Hamilton. He and myself then were living in

Sacramento, and were engaged in business there, occupying with our respective firms adjoining stores. It was sometime in the month of October, 1874—I cannot recall the exact date—that he stated to me that a Mr. George W. Colby, since deceased, had offered him an undivided one-twentieth interest in the whole of said lands for the sum of fifteen thousand dollars, and he proposed that I join him in the purchase. He proposed that I take a third interest in said purchase, and that he would take a third interest, and that we would take the other third interest for Mr. L. L. Baker, his partner, who was then in the East, and subject to his approval on his return. We took the abstract of title of the property, and map of the road, and such documentary evidence concerning the same as Mr. Colby had given Mr. Hamilton, and read and examined them together. We then submitted all of these title papers to Mr. George Cadwalader, an attorney-at-law, then practicing in Sacramento, and since deceased, for his examination and report upon the title, with a view to our making said purchase. We were favorably impressed with our own examination of these documents, as we saw therein the opinion of Messrs. Mitchell & Dolph, attorneys at Portland, that the title was good, also the certificates of the governors of Oregon that the road had been constructed, and also the certificate of the United States Commissioner of the General Land Office that the map of the road had been filed in his office, and shortly afterwards, upon receiving a report from our attorney, Mr. Cadwalader, that the title was good, we concluded to make, and did make, the purchase. I relied upon Mr. Cadwalader's opinion, as he was also my attorney in other matters, and especially upon the abstract of title, the written opinion of Messrs. Mitchell & Dolph, and the certificates of the governors of Oregon in said abstract. I considered them official documents of the highest order obtainable, and as being beyond question or impeachment. We made the purchase. Mr. Hamilton paid five thousand dollars, I paid five thousand dollars, and we borrowed on a note in bank the other five thousand dollars to await and abide the decision of Mr. L. L. Baker on his return from the East. Mr. Baker returned subsequently and took the

third interest in our purchase and paid the note. Not knowing whether Mr. Baker would join in the purchase we took a deed from Mr. Colby to ourselves. My recollection is that our first deed to the said one-twentieth interest in said lands was taken early in November, 1874, and was signed by Mr. Colby only. Ascertaining afterwards that the laws of Oregon required a wife to join in the deed, we procured a second deed from G. W. Colby and wife, dated February 15, 1875. We did not make any deed to Mr. L. L. Baker for his purchase. The record title remained in Mr. Hamilton and myself until the organization of the California and Oregon Land Company. After that corporation was organized Mr. Hamilton and myself joined in a deed to it and conveyed the entire one-twentieth undivided interest, being the same we had purchased from Mr. Colby and wife. When the California and Oregon Land Company was ready to issue its capital stock, Mr. Baker, Mr. Hamilton and myself apportioned our respective interests, and they took in their firm name of Baker & Hamilton six hundred and sixty-six and two-thirds shares, and I took three hundred and thirty-three and one-third shares of the capital stock of the California and Oregon Land Company, which were the amounts to which we were respectively entitled.

Q. 8—State fully and at large any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

A—I have already stated a full history of my purchase in answer to the last interrogatory. I know of no other fact material to the issue joined in this suit, or which would be to the advantage of either party thereto.

CROSS-EXAMINATION.

X Q. 1—How many shares of stock, if any, did you own or hold in the California and Oregon Land Company, and when and how did you acquire the same?

A—I own now and have owned since the organization of the California and Oregon Land Company and issuance of its stock, three hundred and thirty-three and one-third

shares. I received them from said company in consideration for my deed to said corporation of my interest in said lands in controversy in this suit. I acknowledged said deed to said corporation on the 9th day of April, 1877. I received my three hundred and thirty-three and one-third shares of its capital stock on May 18, 1877. It took some time to get the stock certificate book printed and the stock ready for issuance by the corporation.

X Q. 2—Are you an officer or director in said company?

A—I am now a director in said company. I was for the first time elected a director at the last annual meeting of said company, January 20, 1891.

X Q. 3—Who did you acquire said stock from?

A—Direct from the company, as I have already testified.

X Q. 4—Prior to the time you acquired said stock, had you ever been in the State of Oregon or examined the land grant in controversy in this suit, or been over or seen the road of the said Oregon Central Military Road Company?

A—Prior to the purchase of my interest in said lands from Colby and wife, nor prior to my acquiring my said stock in said company, I had never been in the State of Oregon, or examined the land grant in controversy in this suit, or been over or seen the road of the said Oregon Central Military Road Company.

X Q. 5—Did you make any inquiry or research to find out, or to satisfy yourself as to the condition of the lands included in said grant, or the title thereto, or as to whether or not the said road had been duly or seasonably constructed, as required by law; if so, state what they were?

A—As I have stated quite fully in my answer to direct Interrogatory 7, I did make such inquiry and research into the condition of the lands included in the grant, and of the title thereto, and as to whether or not said road had been seasonably constructed as required by law, as I could make from an examination of the abstract of title, certificates of governors and U. S. Commissioner of General Land Office, the map and other documents connected therewith, and I further consulted my attorney, Mr. Cadwalader—submitted the title papers to him—and obtained from him a favorable

report that the title was good. I also talked with Messrs. Pond, Luning, Belcher, Rideout and others, who were then owners in said lands, all of whom I knew personally to be prudent, cautious, careful and successful business men of high standing in the State and cities where they lived, and from all these sources of information combined I heard only favorable reports, and was consequently decided to make the purchase, and did so in perfect good faith, and in full confidence in the title to the lands being perfect and beyond question. I also, in these inquiries, ascertained that over three hundred thousand acres of the lands had actually then been listed by the government to said Oregon Military Road Company, which fact I considered conclusive of the whole matter.

X Q. 6—Prior to the time you acquired said stock in the California and Oregon Land Company, did you ever see the certificates, or alleged certificates, of the Governors of Oregon, that said road had been built; if so, who showed such certificates, when was it, and who else was present?

A—As already stated several times, I did see in the abstract of title certified copies of the certificates of the Governors of Oregon that said road had been built, prior to my making said purchase, and my recollection is very distinct on that point, that Mr. Hamilton and myself had the abstract and map, and that we examined the same together, and that it was shortly before making said purchase in November, 1874, and that after discussing and examining it ourselves, my impression now is that I afterwards discussed and examined it with my said attorney, Mr. Cadwalader. I do not know or recollect now whether any other persons were present at any of my examinations of the title papers before making the purchase, or not.

JAMES CAROLAN.

Subscribed and sworn to before me, this 25th day of August, 1891.

L. S. B. SAWYER,
Commissioner, etc.

EXAMINATION-IN-CHIEF OF JOHN BOGGS.

Q. 1—State your name, age, residence and occupation?

A—My name is John Boggs, my age sixty-one years, residence Colusa county, California, occupation farmer.

Q. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

A—I am not now a stockholder in said company. I sold my last stock in said company on March 14, 1888, since when I have had no interest in or connection with said company.

Q. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

A—I was one of the original subscribers to the original stock of the company.

Q. 4—Were you or were you not one of the purchasers of a tract of land granted by the Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2d, 1864, and afterwards granted by the State of Oregon by an act of its legislature approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

A—I was one of the purchasers of said land grant.

Q. 5—If you answer that you were one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid, and whether the same was paid, and when and how?

A—By deed dated May 15, 1874, from B. J. Pengra and wife to myself and others I became the purchaser of an undivided one-tenth interest in the undivided one-half of said land grant. My attention was first called to the purchase by Mr. W. H. Parks of Marysville, California. He stated what the land grant was quite fully; that Mr. Edgar Mills of Sacramento, Mr. Pond and Mr. Belcher intended to take an interest in it; that he, Mr. Parks, intended to take an interest also, and that he would like me to join in the purchase. He said the

whole cost of the undivided one-half interest would be one hundred thousand dollars, and he solicited me to take or purchase a one-tenth interest in the same. I said to him that I would examine or have the title examined, and if it was satisfactory to me I would join in the purchase to the extent of taking the one-tenth interest at a cost of ten thousand dollars. At this time, which I think was some time in April, 1874, Mr. Parks showed me a map of the road, starting at Eugene City and continuing easterly across the State of Oregon to the eastern boundary of the State. It was certified to by the Governors of Oregon, and that certificate stated, as nearly as I can now recollect, that said road had been properly constructed. It had every appearance of being an official map, and I so understood it to be, and issued by the proper authorities. He also stated that over three hundred thousand acres of the lands under the grant had then been listed to the Oregon Central Military Road Company, and that other lands were being also listed at the time for patenting to said company. We discussed the matter very fully, and he promised to show me an abstract of the property, and in a few days thereafter I met him in Sacramento City and was shown by him the abstract. I looked it over myself, read the copies of the certificates of the Governors of Oregon, therein certifying to the construction of the road; also the certificate of the United States Commissioner of the General Land Office, stating, as well as I now recollect, that the map of the road had been filed in his office. I also saw therein the written opinion of Messrs. Mitchell & Dolph, attorneys, of Portland, Oregon, that the title to the land was good. I took that abstract and map above mentioned, and such documents pertaining to the whole matter as Mr. Parks then gave me, and went to see Mr. Edgar Mills about it, who operated with me in various matters, and who Mr. Parks informed me would take an interest in this purchase. Mr. Mills and myself discussed the purchase quite thoroughly. We did not feel ourselves fully competent to pass upon the title, and we took the documents to Mr. George Cadwalader, attorney at law, in Sacramento (since deceased), and employed him to make full examination and report to us upon the title question.

About two weeks afterwards, Mr. Cadwalader reported to me that the title was good, and that I need have no fear about it whatever. I then proceeded to consummate the purchase and pay for it. I paid my amount, ten thousand dollars, by a certified check on the Bank of Colusa County to W. H. Parks. I have the cancelled check in my possession to this day.

Q. 6—At the time, or previous thereto, of the making of such purchase and the payment of the money and delivery of the deeds thereof to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice or information, suspicion or ground of suspicion or reason to suspect or believe that there had been any fraudulent act or misrepresentations or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2nd, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably, and properly, according to the granting acts.

A—At the time of making such purchase, or previous thereto, and the payment of the money and delivery of the deeds thereof to myself and my associates, neither myself nor my associates, to my knowledge, had any knowledge, notice, or information, suspicion, or ground of suspicion, or reason to suspect or believe that there had been any fraudulent act or misrepresentations or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts. Had I had any such suspicions I would have had nothing to do with the matter—would not have made the purchase. I relied wholly upon the certificates of the governors of Oregon, and the examination made by the attorneys as to the soundness of the title, and supposed everything was done in good faith, and I paid my money with that understanding.

Q. 7—Had you or had you not, at or prior to the date of said purchase, the delivery to you and your associates of the deeds for said land, and the payment of the purchase price thereof, any knowledge, information, notice, suspicion or ground of suspicion, or reason to suspect or believe that any fraud had been practiced, or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers or agents or stockholders, or by any other person or persons acting in its interest or in its employ, or by any person or persons whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States to induce that officer to falsely issue patents for said land.

A—I had not, either at the time of making the purchase or previous thereto, or at the time of the delivery of the deed and payment of the money, any knowledge, information, notice, suspicion or ground of suspicion or reason to suspect or believe that any fraud had been practiced or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, or agents, or stockholders, or by any other person or persons acting in its interest, or in its employ, or by any person or persons whomsoever, to the governor of the State of Oregon to induce such governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States to induce that officer to falsely issue patents for said lands.

Q. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

A—On the 3d of March, 1877, I acknowledged a deed for

my interest in said lands to the California and Oregon Land Company.

Q. 9—If in answer to Interrogatory 8 you say that you conveyed said land to the California and Oregon Land Company, please state what, if any notice, knowledge, information, suspicion or ground to suspect, or reason to believe, the said California and Oregon Land Company, or any of its officers or agents or stockholders or yourself, had at and prior to the conveyance to the said company by you and your associates of said lands, and the delivery of the deeds therefor, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying the completion of the said wagon road, by the governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior, or the Commissioner of the General Land Office, or issuing of patents for any of said land by the President of the United States?

A—Neither at the time I made and delivered the said deed with others of my associates, nor at any time prior thereto, did the said California and Oregon Land Company, or any of its officers or agents, or stockholders, to my knowledge, or myself, have any notice, knowledge, inclination, suspicion, or ground to suspect, or reason to believe, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentations whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said lands by the President of the United States.

Q. 10—State what was the fact as to the purchase made by yourself and your associates of this land from the Oregon Central Military Road Company and the purchase thereof made by the California and Oregon Land Company from you, having been made in good faith, without notice of any fraud whatever, and for value?

A—In answer to Interrogatory 5 I have stated the general facts and circumstances connected with my purchase of the one-tenth interest in the undivided one-half for ten thousand dollars. It was made in absolute good faith, and without the slightest intimation, notice or suspicion of any fraud of any kind whatever. I paid my money in good faith, and under my own examination of the title documents, as I have hereinbefore stated, and upon the advice of my attorney that the title was good, and that I need have no fears in making said purchase.

Q. 11—State fully and at large, any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

A—I know of no fact material to the issue in this suit which would be to the advantage of either party thereto.

CROSS-EXAMINATION.

X Q. 1—Are you an officer or director in the California and Oregon Land Company?

A—I am not an officer or director in the California and Oregon Land Company.

X Q. 2—When did you become a stockholder in the said company?

A—I subscribed to the capital stock of said company, and acknowledged the articles of incorporation thereof on the 9th day of January, 1877. The stock in the corporation was actually issued to me by the officers of the company on May 22, 1877.

X Q. 3—When and from whom did you acquire any shares of stock that you may now hold in the said company?

A—As I stated before, I do not now hold any shares of stock in said company, nor have I any interest whatever therein. At the time of the organization of the company, I deeded my interest in the lands to the company and took in payment therefor the same, or an equal interest in the capital stock of the company that I had owned in the land grant. I owned a one-twentieth interest in the entire grant,

and I took one thousand shares, or one-twentieth of the entire capital stock. I sold out my stock at different times to different persons, realizing for the whole thirty thousand dollars. I sold the last stock in 1884, but it remained in my name on the company's books until March 14th, 1888, as I find by reference to the same.

X Q. 4—Prior to your acquiring said stock, or the alleged purchase of the land grant in controversy herein, had you ever been in the State of Oregon, or seen said lands, or been over the alleged wagon road of the Oregon Central Military Road Company? If so, when was it?

A—Prior to my purchase of my said interest in said land grant, or to my acquiring said stock, I had never been in the State of Oregon, had never seen the lands, or been over the wagon road of the Oregon Central Military Road Company.

X Q. 5—What inquiry or research did you make, if any, before said alleged purchase and payment of the purchase price, to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act? State fully.

A—As stated in my direct examination, after the matter of purchase was presented to me by Mr. W. H. Parks (now deceased, but then residing in Marysville), I met him by appointment in Sacramento. I examined such documents relating to the matter as he there had, and including more particularly the abstract of title, containing the certificates of the Governors of Oregon and the Commissioner of the General Land Office, and the written opinion of Messrs. Mitchell & Dolph, attorneys at law, the map of the road certified to as an official and authoritative document, all of which I took for consultation with Mr. Edgar Mills, and thence after to Mr. Cadwalader, attorney at law, for his legal opinion as to the title, and took all the precaution I could to ascertain the facts in every respect. But I am not an attorney myself, and of course I relied on the opinion of my attorney. Aside from that I was largely influenced by the official certificates and documents contained in the abstract. I had no doubt or suspi-

cion whatever that the road had been built. I saw that the governors of Oregon had certified that it was constructed, and I had no doubts about it whatever.

X Q. 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the governors of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grant or to the lands included therein?

A—I had seen and examined the certificates of the governors of Oregon that said wagon road had been built. Copies of them were in the abstract of title, which I read and examined and submitted to my attorney, Mr. Cadwalader.

X Q. 7—What part of the consideration for the purchase of said land was paid by you? How was it paid, and when?

A—Ten thousand dollars. I paid it by certified check on the Bank of Colusa County to W. H. Parks. Its date is a few days prior to the date of the deed. The check, canceled, I still have at my residence in Colusa county, and can give, by reference to it, the exact date if necessary.

X Q. 8—Will you swear that to your own personal knowledge all of your associates paid their proportion of such consideration?

A—I do not know, except from hearsay, that my associates paid their proportions. I paid mine, and I know that Edgar Mills telegraphed to pay his, and it was paid. Ten thousand dollars was paid by him, and by myself a like amount.

X Q. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

A—I paid the check to Mr. W. H. Parks, and I do not now remember whether any one else was present or not at the time.

X Q. 10—You will not undertake to swear, will you, of your own personal knowledge, that your associates did not have any knowledge, notice, or information, suspicion, or

ground for suspicion, or reason to suspect or believe, that the said wagon road had not been built according to the granting acts?

A—I cannot swear as to what my associates, in the purchase, may have known, but I had not myself, nor do I believe any of my associates had, any knowledge, notice or information, suspicion, or ground for suspicion, or reason to suspect or believe, that the said wagon road had not been built according to the granting acts.

X Q. 11—Was G. W. Colby one of your associates in said purchase?

A—Mr. G. W. Colby was one of the associates in said purchase.

X Q. 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete the said purchase?

A—He did not. My transaction or purchase was made through Mr. Parks. Considering the title safe I paid my money to Mr. Parks, and so far as I was concerned the transaction was complete. I learned afterwards that both Colby and Parks went to Oregon to see that no liens, or mortgages, or judgments, had been filed against the lands since the date of the abstract. If they, or either of them, ever went for any other purpose connected with the purchase of the undivided one-half, in which I became interested, I never knew of it.

X Q. 13—Will you undertake to swear that Mr. Colby did not have notice or information that the said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

A—Mr. Colby is now deceased. In his lifetime I had a good deal of business with him, and always found him honest and reliable. In all the conversations I had with him respecting this purchase, and prior to concluding the same, I understood from him that he had never been to Oregon, or over the road or on the lands granted, but, like myself, became satisfied with the title, and all matters connected therewith, from similar sources of information that had satisfied me.

X Q. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company? State fully what relation he had, if any, with said company.

A—Mr. Colby was a stockholder in said California and Oregon Land Company, as I find upon looking on the books of said company. Beyond that I do not know whether he was ever an officer or director, or held any other relation to said company or not.

X Q. 15—Did you know of your own personal knowledge what notice or information your associates might have had, or might not have had, with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said wagon road had not been built, as required by the granting act?

A—I did not know of my own knowledge, and so long as I remained an owner or stockholder in said lands, or in said stock, did I know or ever suspect that any of my co-owners or associates had any notice or information with reference to the fraud charged in the bill in this case, or of the defects in the title of the Oregon Central Military Road Company, or that said road had not been built, as required by the granting acts. As previously stated, I had no such knowledge, nor do I believe they had.

JOHN BOGGS.

Subscribed and sworn to before me this 25th day of August, 1891.

L. S. B. SAWYER,
Commissioner, etc.

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco. } ss.

This certifies that I, Lorenzo S. B. Sawyer, Clerk of the United States circuit court of the ninth judicial circuit and Northern District of California, and special commissioner herein, by virtue of the foregoing commission to me directed, caused the above-named Edgar Mills, B. F. Baker, M. P. Jones, C. H. Holbrook, Robert Hamilton, L. L. Baker, James Carolan and John Boggs, the deponents therein mentioned, to come before me in San Francisco, in

said County of San Francisco, on the 20th, 21st, 22d, 24th and 25th days of August, A.D. 1891, between the hours of ten o'clock A.M. and six P.M. of said day, and the said witnesses being then and there duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth in answer to the several interrogatories and cross-interrogatories thereto annexed, gave the foregoing answers, and that said answers were taken down in shorthand writing and reduced afterwards to type-writing by A. L. Coombs, Esq., a stenographer, and then carefully read by me to said witnesses, or read by them personally, and then by them subscribed in my presence.

I further certify that N. D. Rideout, one of the witnesses named in said commission, is in Europe, and that A. D. Breed, another witness therein named, could not, after diligent search, be found in this district.

I further certify that C. H. Holbrook and James Carolan were, in my opinion, the persons intended by the names of D. H. Holbrook and James Carolan mentioned in said commission.

In testimony whereof, I hereunto set my hand this 25th day of August, A.D. 1891.

L. S. B. SAWYER, Commissioner.

Endorsed: Filed August 27, 1891, and opened by order of court November 25, 1891.

R. H. LAMSON, Clerk.

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, ET AL.

Interrogatories to be propounded to John Boggs, N. D. Rideout, Edgar Mills, B. F. Baker, M. P. Jones, C. H. Holbrook and A. D. Breed, witnesses on the part of the defendants:

Int. 1—State your name, age, residence and occupation?

Int. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

Int. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

Int. 4—Were you, or were you not, one of the purchasers of a tract of land granted to by Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeastern boundary of the State of Oregon, by an act approved July 2, 1864, and afterwards granted by the State of Oregon by an act of its legislature, approved October 24, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

Int. 5—If you answer that you were one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid, and whether the same was paid, and when and how?

Int. 6—At the time, or previous thereto, of the making of such purchase and the payment of the money and the delivery of the deeds thereof to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe that there had been any fraudulent act or misrepresentations, or failure of duty in the examination or certifying the completion of the wagon road mentioned in said Act of Congress of July 2, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts?

Int. 7—Had you or had you not, at or prior to the date of said purchase, the delivery to you and your associates of the deeds for said land, and the payment of the purchase price thereof, any knowledge, information, notice, suspicion, or ground of suspicion, or reason to suspect or believe, that any fraud had been practiced, or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers or agents, or stockholders, or by any other person or persons acting in its interest or in its

employ, or by any person or persons whomsoever, to the Governor of the State of Oregon, to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them, or either of them, to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States, to induce that officer to falsely issue patents for said lands?

Int. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

Int. 9—If in answer to Interrogatory 8 you say that you conveyed said land to the California and Oregon Land Company, please state what, if any notice, knowledge, information, suspicion or ground to suspect, or reason to believe, the said California and Oregon Land Company, or any of its officers, or agents, or stockholders, or yourself, had at and prior to the conveyance to the said company by you and your associates of said lands, and the delivery of the deeds therefor, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said lands by the President of the United States?

Int. 10—State what was the fact as to the purchase made by yourself and your associates of this land from the Oregon Central Military Road Company and the purchase thereof made by the California and Oregon Land Company from you, having been made in good faith, without notice of any fraud whatever, and for value?

Int. 11—State fully and at large, any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as

fully as though particularly interrogated concerning the same?

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Defendant the California and Oregon Land Company.

Due service of the within interrogatories by certified copy, as provided by law, is hereby admitted, at Portland, Or., August 11th, 1891.

A. H. TANNER,
Attorney for Plaintiff.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company, *et al.*

Cross-interrogatories to be propounded to John Boggs, N. D. Rideout, Edgar Mills, B. F. Baker, M. P. Jones, D. H. Holbrook and A. D. Breed, witnesses on the part of the defendant:

Cross Int. 1—Are you an officer or director in the California and Oregon Land Company?

Cross Int. 2—When did you become a stockholder in said company?

Cross Int. 3—When and from whom did you acquire any shares of stock that you may now hold in the said company?

Cross Int. 4—Prior to your acquiring said stock, or the alleged purchase of the land grant in controversy herein, had you ever been in the State of Oregon or seen said lands or been over the alleged wagon road of the Oregon Central Military Road Company; if so, when was it?

Cross Int. 5—What inquiry or research did you make, if any, before such alleged purchase and payment of the purchase price to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act. State fully?

Cross Int. 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the Governors of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grant or to the lands included therein?

Cross Int. 7—What part of the consideration for the purchase of said land grant was paid by you? How was it paid and when?

Cross Int. 8—Will you swear, to your own personal knowledge, that all of your associates paid their proportion of such consideration?

Cross Int. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

Cross Int. 10—You will not undertake to swear, will you, of your own personal knowledge, that your associates did not have any knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe that the said wagon road had not been built according to the granting acts?

Cross Int. 11—Was G. W. Colby one of your associates in said purchase?

Cross Int. 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete the said purchase?

Cross Int. 13—Will you undertake to swear that Mr. Colby did not have notice or information that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

Cross Int. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company? State fully what relation he had, if any, with said company?

Cross Int. 15—Did you know of your own personal knowledge what notice or information your associates might have had or might not have had, with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that

said wagon road had not been built as required by the granting act?

F. P. MAYS, U. S. Dist. Atty., and
A. H. TANNER,
Solicitors for Complainant.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES, Plaintiff,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, *et al.*, Defendants.

It is hereby stipulated and agreed by and between the parties to this action, by their respective attorneys, that the deposition of N. D. Rideout may be taken before L. S. B. Sawyer, Clerk of the United States Circuit Court at San Francisco, California, upon the attached interrogatories and cross-interrogatories, the same in all respects as though taken upon a commission duly issued out of the circuit court of the United States for the district of Oregon, and when taken, that said deposition shall be returned by mail, duly sealed, and addressed to R. H. Lamson, Clerk of the United States circuit court, Portland, Oregon. Said deposition to be taken on the part of the defendant, the California and Oregon Land Company, and to be read on the trial of said cause subject only to its competency, relevancy and materiality.

A. H. TANNER,
Of Attorneys for the United States.
DOLPH, BELLINGER, MALLORY & SIMON,
Attorneys for the California and Oregon Land Co.

In the circuit court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD Company *et al.*

Be it remembered, that on the 16th and 17th days of October, A.D. 1891, at Room 7, in the Safe Deposit Building, in the city of San Francisco, Northern District of California, personally appeared before me, L. S. B. Sawyer, Commis-

sioner and Clerk, duly appointed by the circuit court of the United States for the Ninth Circuit and Northern District of California, N. D. Rideout, a witness on behalf of the defendants in the above entitled cause.

And the said witness having been by me first cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, in the cause aforesaid, did thereupon depose and say as follows, that is to say:

Int. 1—State your name, age, residence, and occupation?

To the first interrogatory I answer:

Norman Dunning Rideout; age 59 years; residence, Marysville, California, and banker by occupation.

Int. 2—What relation, if any, do you hold to the corporation known as the California and Oregon Land Company, one of the defendants in this suit?

To the second interrogatory I answer:

I am a stockholder and at present a director in the California and Oregon Land Company, a defendant in this suit.

Int. 3—If you answer that you are a stockholder in said corporation, please state whether you are one of the original subscribers for the stock of said company?

To the third interrogatory I answer:

I was one of the original subscribers to the capital stock of said California and Oregon Land Company.

Int. 4—Were you or were you not one of the purchasers of a tract of land granted by the Congress of the United States to the State of Oregon to aid in the construction of a wagon road from Eugene City, Oregon, to the southeast boundary of the State of Oregon, by an act approved July 2d, 1864, and afterwards granted by the State of Oregon by an act of its legislature, approved October 24th, 1864, to the Oregon Central Military Road Company, a corporation organized under the laws of Oregon?

To the fourth interrogatory I answer:

I was one of the original parties to the first purchase of the undivided one-half of said tract of land. I purchased the one-tenth part or interest in said undivided one-half, equivalent to one-twentieth of the whole tract. The purchase was made or concluded May 15, 1874—that being the

date of the deed. I was also one of the original parties to the second purchase of the remaining undivided one-half of said tract of land. I purchased one-twentieth interest in said last mentioned one-half, equivalent to one-fortieth of the whole; the deed to the same was dated October 15, 1874.

Int. 5—If you answer that you were one of the purchasers of said grant, please state fully the circumstances of the purchase, when and how made, the consideration to be paid, and whether the same was paid, and when and how?

To the fifth interrogatory I answer:

The circumstances attending my purchase of the said one-tenth and one-twentieth interests were as follows:

Mr. W. H. Parks, since deceased, first called my attention to the purchase of these lands. He stated that he, Mr. W. C. Belcher and others whom I knew were proposing to join in the purchase of an undivided one-half interest in these lands for the sum of $100,000 cash. That it was proposed to divide the purchase into one-tenth parts or interests, and he solicited me to unite in the purchase and take a one-tenth interest. He introduced to me a Mr. Walker, who was authorized to negotiate for the sale of the property by the Oregon owners. They represented the purchase as a desirable one, and that the title was perfect, and in confirmation thereof showed me an abstract of title containing the history of the grant; certificates of the Governors of Oregon that the wagon road had been completed and accepted, and containing a certificate of Messrs. Mitchell & Dolph, attorneys at law in Portland, that the title was good; also other documents, such as a map of the road and lands, certified as correct by Government officials, evidence of the listing by the United States Government to the Oregon Central Military Road Company at that time of about 340,000 acres of the lands embraced within the grant, and other documents relating thereto. All of which I carefully examined, and relying upon the same, coupled with the fact that said Parks and also W. C. Belcher, whom I knew to be a careful and able attorney at law, were going to unite in the purchase, decided me to make the transaction, and I purchased the one-tenth interest in said one-half for the sum of $10,000. I gave Mr. Parks a letter of credit from our bank

for said $10,000, and left him to conclude the purchase and pay for my said one-tenth interest in said undivided one-half. The exact date of said payment I am unable to state, but it was a short time prior to the date of the deed, which was May 15, 1874. Mr. Parks, Mr. Belcher and myself were all residents of Marysville at the time, and the whole matter was discussed and arranged at that place between us. Subsequently, and some time in October following, we decided to purchase under an option the other or remaining undivided one-half of said lands at an equal price of $100,000, and I purchased the one-twentieth interest in the same for the sum of $5000. My recollection is that I provided Mr. Parks either with the coin or a certificate of deposit, on our bank in Marysville, for said $5000, and trusted to him to make and conclude the purchase. The purchase was made and the whole transaction was concluded by deed, dated October 15, 1874. I sold this one-twentieth interest to Mr. Orren Gowell by deed, dated November 19, 1874, and received $5000 for the same. Each of the above payments were made shortly prior to the dates of said deeds and in the manner I have herein stated.

Int. 6—At the time, or previous thereto, of the making of such purchase and the payment of the money and delivery of the deeds therefor to yourself and your associates, if you say the purchase was made, the money paid and the deeds delivered, please state whether you or any of your associates, to your knowledge, had any knowledge, notice, or information, suspicion, or ground of suspicion, or reason to suspect or believe, that there had been any fraudulent act or misrepresentations or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2d, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts?

To the sixth interrogatory I answer:

At the time, or previous thereto, of making the purchase of either of said interests, as named in said deeds of May 15th and October 15th, 1874, and the payment of the money for the same, or of the delivery of the said deeds, neither I,

nor any of my associates in said purchases, to my knowledge, had any knowledge, notice or information, suspicion or ground of suspicion, or reason to suspect or believe, that there had been any fraudulent act or misrepresentation or failure of duty in the examination or certifying the completion of the wagon road mentioned in said act of Congress of July 2, 1864, or any part thereof, or that the said road had not been constructed, wholly, seasonably and properly, according to the granting acts.

Int. 7—Had you or had you not, at or prior to the date of said purchase, the delivery to you and your associates of the deeds for said land, and the payment of the purchase price thereof, any knowledge, information, notice, suspicion or ground of suspicion, or reason to suspect or believe that any fraud had been practiced or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, or agents, or stockholders, or by any other person or persons acting in its interest or in its employ, or by any person or persons whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company or to the President of the United States to induce that officer to falsely issue patents for said land?

To the seventh interrogatory I answer:

I had not, either at or prior to the date of said purchases or the delivery to me or my asociates of the said deeds, or either of them, for said land, and the payment of the purchase price thereof, any knowledge, information, notice or suspicion or ground of suspicion, or reason to suspect or believe that any fraud had been practiced or any misrepresentations whatever made by the Oregon Central Military Road Company, or any of its officers, or agents, or stockholders, or by any other person or persons acting in its interest or in its employ, or by any person or persons whomsoever, to the Governor of the State of Oregon to induce such Governor to falsely certify that said wagon road had

been completed, or to the Secretary of the Interior, or the Commissioner of the General Land Office, to induce them or either of them to falsely list lands to the State as having been earned by said Oregon Central Military Road Company, or to the President of the United States to induce that officer to falsely issue patents for said land.

Int. 8—What disposition did you and your associates, to your knowledge, make of the land so purchased by you and them?

To the eighth interrogatory I answer:

I sold my remaining one-tenth of the undivided one-half, equivalent to one-twentieth of the whole, to the California and Oregon Land Company, one of the defendants in this suit, soon after the organization of that company, uniting in same deed with the other owners, and receiving in full payment therefor my one-twentieth or 1000 shares of the capital stock of said corporation.

Int. 9—If, in answer to Interrogatory 8, you say that you conveyed said land to the California and Oregon Land Company, please state what, if any notice, knowledge, information, suspicion or ground to suspect, or reason to believe, the said California and Oregon Land Company, or any of its officers, or agents or stockholders, or yourself, had at and prior to the conveyance to the said company by you and your associates of said lands, and the delivery of the deeds therefor, that there had been any fraud or misrepresentations or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentation or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing patents for any of said land by the President of the United States.

To the ninth interrogatory I answer:

Neither at the time, nor prior to making the conveyance to said California and Oregon Land Company by me and my associates in said lands, and the delivery of the deed therefor to said corporation, did I, or any of my associates, to my knowledge, nor did said California and Oregon Land

Company, or any of its officers or agents, or stockholders, have any notice, knowledge, information, suspicion, or ground to suspect, or reason to believe, that there had been any fraud or misrepresentation or failure of duty in the examination or certifying of the completion of the said wagon road by the Governor of Oregon, or of any fraud or misrepresentation whatever connected with or relating to the construction or certifying the completion of said wagon road, or the listing of any part of lands by the Secretary of the Interior or the Commissioner of the General Land Office, or issuing of patents for any of said land by the President of the United States.

Int. 10—State what was the fact as to the purchase made by yourself and your associates of this land from the Oregon Central Military Road Company and the purchase thereof made by the California and Oregon Land Company from you, having been made in good faith without notice of any fraud whatever, and for value?

To the tenth interrogatory I answer:

The simple facts as to the purchase by myself and associates of this land from the Oregon Central Military Road Company and the sale to and purchase by the California and Oregon Land Company, are as hereinbefore recited. Both transactions were made in good faith, without any notice, knowledge or suspicion of fraud whatever. Had I had the least suspicion of fraud or of any defect in the title to these lands, I would not have invested one dollar, nor been in any way connected with said purchases. I bought in good faith and paid my money in good faith. I did not see, or know, or talk with all of my associates in said different purchases, prior to the same being made. I knew others paid for their interests the same price I paid for mine. Each purchased on his own account as individuals, and in such interests as suited him. The California and Oregon Land Company was organized for our mutual interest and convenience in handling the lands and property, and to avoid administration upon estates of any deceased owners; and each owner in the lands took his pro-rata amount of stock in the corporation or equivalent to his exact ownership in the lands. The purchases were made by us as asso-

ciates or individuals, not as a partnership. Each purchased his interest on his own account, and when the final purchase was completed there were a number of owners and a wide difference in the respective ownerships. Some had two-tenths, some one-tenth, some one-twentieth, some one-fortieth, and so on. We found it difficult to attend to the property in this way, to apportion, collect and pay taxes on the lands, and we finally got the owners to consent to form, and did form, the corporation, as I have just stated.

Int. 11—State fully, and at large, any other fact within your knowledge, and material to the issue joined in this suit, which would be to the advantage of either party hereto, as fully as though particularly interrogated concerning the same?

To the eleventh interrogatory I answer:

I do not know of any other fact material to the issue in this case which would be of any advantage to either party hereto, and have endeavored to reply to all the interrogatories to the best of my knowledge and ability after so great a lapse of time.

CROSS-INTERROGATORIES.

Cross Int. 1—Are you an officer or director in the California and Oregon Land Company.

To the first cross-interrogatory I answer:

I was one of the directors or trustees named in the original articles of incorporation of the California and Oregon Land Company, dated November 2, 1876, and I have been annually re-elected and served the corporation in that capacity ever since and am now one of its trustees.

Cross Int. 2—When did you become a stockholder in the said company?

To the second cross-interrogatory I answer:

I became a stockholder upon the organization of the corporation and have been such ever since.

Cross Int. 3—When and from whom did you acquire any shares of stock that you may now hold in the said company?

To the third cross-interrogatory I answer:

On June 2, 1877, the company issued to me 1000 shares

of its capital stock in payment for my deed to my twentieth interest in the whole lands. On March 13, 1884, I purchased 400 shares more of said stock from one W. S. Gage, and have held it since, and now own 1400 shares of said stock.

Cross Int. 4—Prior to your acquiring said stock or the alleged purchase of the land grant in controversy herein had you ever been in the State of Oregon or seen said lands or been over the alleged wagon road of the Oregon Central Military Road Company; if so, when was it?

To the fourth cross-interrogatory I answer:

Prior to the purchase of said stock, nor prior to the purchases of any interest in said land grant, I had never been in the State of Oregon or seen any of the said lands nor been over the wagon road of the Oregon Central Military Road Company.

Cross Int. 5—What inquiry or research did you make, if any, before said alleged purchase and payment of the purchase price, to ascertain the condition of said land grant, or the title to said lands, or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act. State fully?

To the fifth cross-interrogatory I answer:

I made no inquiry or research prior to purchasing my interest in said lands and paying therefor to ascertain the condition of said land grant or the title to said lands or to ascertain whether or not any wagon road had been built by said Oregon Central Military Road Company, as required by the granting act, except to read carefully the abstract of title and documents therein furnished me. It contained certificates of the Governors of Oregon that the road had been completed and accepted. It recited the granting acts. It had appended a certificate of the Secretary of the Interior and Commissioner of the General Land Office, and was accompanied by a map certified by the officials of the United States, showing the line of the road and the limits of the grant clearly defined. The abstract was certified by Messrs. Mitchell & Dolph, attorneys at law, whom I knew to be of high standing, as correct, and that the title was

good. I saw that about 340,000 acres of the lands had already been duly listed over by the United States to the Road Company in compliance with the terms of the granting acts. I had no doubt about it. My business of banking and loaning money on real estate made me familiar with abstracts and titles to lands, and I considered this one beyond question, and, on the faith and belief in the genuineness and validity of these documents, I decided to make and did make the purchase.

Cross Int. 6—Prior to said alleged purchase had you seen or examined the alleged certificates of the Governors of Oregon that said wagon road had been built, or had you seen or examined any abstract of title to said land grant or to the lands included therein?

To the sixth cross-interrogatory I answer:

As I have just stated, before making the purchase I had seen and examined the certificates of the Governors of Oregon that said road had been built, and I had seen and examined and read very carefully the abstract of title to said land grant and lands included therein, and I had no doubt of their genuineness or of their sufficiency to pass title whatever. Had I entertained any doubt, I would not have purchased at all or had anything to do with the transaction.

Cross Int. 7—What part of the consideration for the purchase of said land grant was paid by you? How was it paid and when?

To the seventh cross-interrogatory I answer:

In the first purchase of the undivided half of said lands, concluded by deed of May 15, 1874, I bought a tenth interest and paid my proportionate amount of the whole purchase price, to wit: $10,000. I paid it in the city of Marysville, California, to Mr. W. H. Parks, by a letter of credit on our bank there, and it was a short time before the date of the deed, but the exact date I cannot now state. In the second purchase of the undivided half of said lands, concluded by deed of October 15, 1874, I bought a twentieth interest and paid my proportionate amount of the whole purchase price, to wit: $5000. I paid that also in our bank at Marysville to Mr. W. H. Parks, in coin or by a certificate

of deposit in our bank for $5000. I paid it a short time before the date of the deed to Mr. Parks, but the exact date I cannot state. In the flood of 1875, which overflowed the city of Marysville, many of our bank books were lost, and others so injured and damaged that I cannot refer to them for the exact dates of the above payments, but I am positive I paid said amounts at the times and in the manner above stated.

Cross Int. 8—Will you swear that to your own personal knowledge all of your associates paid their proportion of such consideration?

To the eighth cross-interrogatory I answer:

I cannot swear that all my associates in said purchases paid their different proportions thereof, because I was not present when all paid in their respective amounts. I know that some paid their amounts, because they were paid through our bank. C. H. Holbrook and Isaac Allen paid for their interests in that way. I only know from hearsay that the others paid like proportionate amounts, different ones often telling me that they paid, and I never had any doubt about it.

Cross Int. 9—To whom did you pay your part of such consideration, and who else was present at the time, and where was it paid?

To the ninth cross-interrogatory I answer:

I paid my part in each purchase to W. H. Parks in the city of Marysville in our banking house in that city, and do not recollect of any other persons being present at the time, except our cashier, Mr. Parks and myself. Our bank was always open to the public during business hours, and many people passed in and out in the ordinary transaction of business, but I cannot remember any other persons being present than those I have stated, at the time.

Cross Int. 10—You will not undertake to swear, will you, of your own personal knowledge, that your associates did not have any knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe that the said wagon road had not been built according to the granting acts?

To the tenth cross-interrogatory I answer:

I cannot swear of my own knowledge that my associates in said purchases did not have any knowledge, notice or information, suspicion or ground for suspicion, or reason to suspect or believe that the said wagon road had not been built according to the granting acts. But I saw and talked with several of the purchasers before the transactions were finally concluded, and none of us had any such notice or information, suspicion or ground for suspicion, or reason to suspect or believe that said wagon road had not been built according to the granting acts. I had no such notice or suspicion, nor do I believe that any of the other purchasers, whom I knew, or with whom I discussed the purchase, had any such notice or suspicion. We had mutual confidence in each other and in the proposed purchase, and I certainly would not, nor do I believe the others would have invested in the purchase, if any such notice, information or suspicion had existed in the minds of any of us.

Cross Int. 11—Was G. W. Colby one of your associates in said purchase?

To the eleventh cross-interrogatory I answer:

G. W. Colby was one of my associates in said purchase.

Cross Int. 12—Did not said G. W. Colby come to Oregon in the interest of yourself and associates in said purchase to complete the said purchase?

To the twelfth cross-interrogatory I answer:

I made my purchases through solicitation of Mr. W. H. Parks. Some others did the same, as I recollect, to wit: B. F. Baker and John Boggs. And finally it was decided that both Mr. Parks and Mr. Colby should go to Oregon with instructions to conclude the purchase, if the title, as shown by the abstract presented to us, and upon which we proposed to purchase, remained the same, and no liens, judgments or incumbrances had been placed upon the property since the date of the abstract. For myself, I relied upon Mr. Parks in this matter.

Cross Int. 13—Will you undertake to swear that Mr. Colby did not have notice or information that said wagon road had not been built by said Oregon Central Military Road Company, as required by the granting acts?

To the thirteenth cross-interrogatory I answer:

I cannot undertake to swear as to what existed in the mind of Mr. Colby at the time, or whether he did or did not have any notice or information that said wagon road had not been built by said Oregon Central Military Road Company as required by the granting acts. But in all the conversations I ever had with him on the subject of the purchase, he fully endorsed the representations made to me by Mr. Parks concerning the property, the genuineness and perfection of its title, and never conveyed the slightest suspicion of any defect therein. My recollection is, that at the time of the purchase on May 15, 1874, neither Mr. Colby nor Mr. Parks had been over the lands in question, or over the wagon road, and had only the same sources of information regarding the property that they presented to each of us respectively when soliciting us to unite in its purchase.

Cross Int. 14—Was said G. W. Colby a stockholder, officer or director, at any time, in the said California and Oregon Land Company? State fully what relation he had, if any, with said company?

To the fourteenth cross-interrogatory I answer:

G. W. Colby was a stockholder in the California and Oregon Land Company; one of the first or original stockholders. On May 22, 1877, the corporation issued to him 2000 shares. On May 16, 1882, the 2000 shares were transferred by the administrator of the estate of G. W. Colby, deceased, to one W. S. Gage, as I find by reference to the books of the corporation. Mr. Colby never was an officer or director in the company.

Cross Int. 15—Did you know of your own personal knowledge what notice or information your associates might have had or might not have had with reference to the fraud charged in the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said wagon road had not been built as required by the granting act?

To the fifteenth cross-interrogatory I answer:

I did not know, nor had I any personal knowledge of what notice or information my associates might have had, or might not have had with reference to the fraud charged in

the bill in this case, or the defects in the title of the said Oregon Central Military Road Company, or that said wagon road had not been built, as required by the granting act. I had no such notice or information, nor do I believe that any of my associates had any such notice or information. I can only repeat what I have said hereinbefore several times, that my belief is, that if any of the parties concerned in the purchase had known or suspicioned any fraud in any way connected with the matter from its inception, or that the title was not good or could be defeated in any way, they would not have invested their money in the purchase or had anything to do with it.

N. D. RIDEOUT.

Subscribed and sworn to before me, this 17th day of October, A.D. 1891.

L. S. B. SAWYER,
Commissioner and Clerk U. S. Circuit Court,
Northern District of California.

[SEAL]

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco. } ss.

This certifies that I, L. S. B. Sawyer, commissioner and clerk of the United States circuit court, ninth judicial circuit, northern district of California, and special commissioner herein by virtue of the foregoing stipulation attached hereto, caused the above-named N. D. Rideout, the deponent therein mentioned, to come before me in San Francisco, in said county of San Francisco, on the 16th and 17th days of October, A. D. 1891, between the hours of 10 o'clock A.M. and 6 P. M. of said days, and the said N. D. Rideout being then and there duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in answer to the several interrogatories and cross-interrogatories thereto annexed, gave the foregoing answers, and that said answers were taken down in shorthand by Clement Bennett, official reporter, and then carefully read by me to said N. D. Rideout, and then by him subscribed in my presence.

Witness my hand and the seal of said circuit court, this 17th day of October, A. D. 1891.

[SEAL] L. S. B. SAWYER,
Commissioner and Clerk U. S. Circuit Court, Northern District of California.

Endorsed: Filed October 19, 1891, and opened by order of court Nov. 25, 1891.

R. H. LAMSON,
By R. B. Lamson, Deputy.

In the circuit court of the United States for the district of Oregon.

UNITED STATES
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, G. W. Colby, John Boggs, N. D. Rideout, W. H. Parks, R. F. Parks, Edgar Mills, C. E. Pond, Nicholas Luning, W. C. Belcher, B. F. Simpson, J. W. Peck, Isaac Allen, B. F. Baker, M. P. Jones, D. H. Holbrook, Isaac Lohman, A. D. Breed, B. J. Pengra, and The California and Oregon Land Company, defendants.

DISTRICT OF OREGON, ss.

August 6, 1891. 1:30 P.M.

At this day the above entitled cause came on for taking testimony before me at my office in the city of Portland in said district, the complainant appearing by F. P. Mays, United States District Attorney, and A. H. Tanner, his assistant, and the defendants appearing by Rufus Mallory, of their counsel; whereupon the following proceedings were had, to wit:

EXAMINER.

Counsel for the complainant now state that they claim under the issues joined in this suit that the burden is upon it to begin the taking of testimony in support of the bill to prove the allegations of fraud therein charged and notice thereof to the defendants, and at this time propose to offer testimony in support of their bill, and for that purpose call as a witness in behalf of the complainant herein George Joseph, and ask to have him sworn, and to have his testi-

mony taken herein, as required by the 67th Rule of the Supreme Court as amended.

Counsel for the defendant, the California and Oregon Land Company, object to the introduction of the witness by the complainant for the purpose of proving the allegations of its bill at this time, and claims that the only questions to be established by proof are upon issues between the plea and the reply filed herein; that the onus of proof of the truth of the plea is on the defendant, and that the question of construction of the road or any other questions of fraud charged in the bill cannot be inquired about, but evidence can only be now introduced to prove the truth of the plea; therefore objects to the calling of the witness and to the witness being sworn or examined at this time.

George Joseph, being called as a witness in behalf of the complainant, and duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Tanner:

My name is George Joseph, my age is 19, my residence Portland, Oregon, occupation law student.

Q—Are you acquainted with the line of the Oregon Central Military Road leading from Eugene over the mountains to Southeastern Oregon?

Objected to by counsel for defendant as incompetent, immaterial and not proper testimony to be introduced at this time.

A—Yes, sir; I am.

Q—Have you been living on the line of this road at any time?

Objected to as immaterial and incompetent.

A—Yes, near it; within five miles of it.

Q—I will ask you to state fully whether or not any wagon road was ever constructed or built by the Oregon Central Military Road Company over or upon the route of said road, and state fully all that you know about the manner in which said road was built, if any was built, whether the streams across which it was built were bridged, whether any grades were made or turn-outs, and state fully the manner in which said road was built and constructed, if any such road was built, and when it was and by whom?

Counsel for the defendant objects to the question as immaterial and irrelevant; that under the pleadings, as they stand now in the court, testimony concerning the construction of the road cannot be introduced and ought not to be introduced into the record; and counsel therefore requests the Examiner that before this answer is made, the question as to its materiality and competency and its whole relation to the case shall be certified to the court for its determination and decision before any further testimony is taken.

Examiner's Note.—I am requested by defendant's counsel under the provisions of the United States equity rule No. 67, to certify to the court for its consideration and determination three questions:

1st. Whether or not the burden of proof is upon the complainant to maintain at this time by its testimony the allegations of the bill so that it will be entitled to the affirmative in opening and closing the testimony; and

2d. Whether or not it is competent for the complainant to introduce at this time evidence tending to show the manner of the construction of the alleged road, the fact that such construction did not comply with the law, and that the defendants had notice thereof; and

3d. Whether under the pleadings as they now are in the cause, the only matter to be proved is the truth of the matter in issue between the plea and the replication, and whether the affirmative of this proof is not upon the defendant.

And accordingly I herewith certify these questions to the court for its consideration.

Respectfully submitted,

GEO. H. DURHAM, Examiner.

Whereupon an adjournment was now taken herein until 10 o'clock to-morrow morning.

GEO. H. DURHAM, Examiner.

PORTLAND, August 7th, 1891, 10 o'clock A. M.

The taking of testimony herein was adjourned until 1:30 P. M.

GEO. H. DURHAM, Examiner.

1:30 P. M.

Come now the parties at my office pursuant to the last adjournment, whereupon the following proceedings were had and done, to wit:

In the matter of the question certified up to the Court for determination as to the procedure in taking testimony, it having been held by the Court that the burden of proof was upon the defendant to support the allegations of their plea, the witness heretofore called in behalf of the complainant was directed to stand aside, and thereupon the defendants began the taking of testimony as follows:

Byron J. Pengra, a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Question by Mr. Mallory.

State your name, age, residence and occupation?

1 A—B. J. Pengra, residence now Springfield, Oregon, I have lived in Portland, my occupation is a variety, I have been generally employed looking after my business, which is sometimes one thing and sometimes another, engaged in stock raising, building cities, etc.

2 Q—Did you know of the existence of a corporation known as the Oregon Central Military Road Company?

A—I did know of such a company, long since extinct.

3 Q—What relation, if any, had you with that company when it existed?

A—I was a stockholder, I think one of the incorporators, and at different times an officer of the company.

4 Q—What office?

A—General superintendent, if I recollect the name that was adopted for that position; afterwards president and I think land agent; but was a director throughout its life as I recollect now; it is a long time since the existence of that company and I may not get every answer correct, and would like to look over my testimony for correction purposes after it is through with.

5 Q—Do you know whether or not the State of Oregon granted to that company certain lands that were granted to the State by an act of Congress of date of July 2nd, 1864?

Objected to as incompetent.

A—I do not know the date. I know that there was granted by my solicitation through our Senators and Members in Congress to the State an amount of lands, to be dedicated to that purpose, and I took the lead in the organization of the company, which was organized prior to the session of the Legislature, for the grant had to be made to the State before it was converted to the company. The company was in being with a small amount of stock at the time the grant was made, whether it was in 1864 or in 1865 I cannot recollect. It seems to me the grant was obtained very late in 1864 and the conveyance was made in 1865. The statutes of the State will show all these facts.

6 Q—What is the fact, did the company receive this grant from the State?

A—It did, in 1864 or 1865.

7 Q—State, if you know, what become of that land so granted to the State; what was done with it by that company, is what I mean?

Objected to as incompetent and not the best evidence, by counsel for the complainant.

A—They began conveying it in small amounts to settlers, and ultimately sold the remaining portion, which was the greater portion, to a company of gentlemen residing mainly in California.

8 Q—Would you know the name of the company?

A—Well, they were entitled, as I understood it at the time, or certified, as parties in interest in the company, which was a joint company without issuing stock, I think. That was my impression at the time of the sale by the company.

9 Q—Would you know the names of those people if you should hear them?

A—Most of them, probably.

10 Q—G. W. Colby?

A—He was one of them; one of the gentlemen here at the time of the first conveyance.

11 Q—John Boggs?

A—Yes, sir; I think that was one of the names.

12 Q—It was a company of whom they were a part; you are not able to state, are you, the names of all?

A—It was an association of men, as I understood it, who were not organized at the time of the conveyance. I became afterwards an attorney of theirs, and they were then parties in interest, and had no corporation, as I understood it.

14 Q—Who acted for your company in making that sale?

A—The records will show you that Mr. Ladd was authorized by order of our company to make sales. At that time I was only a land agent of the company, and had general instructions in relation to these matters. Mr. Ladd sold the land to the company.

15 Q—What knowledge, if any, have you of that sale having been made?

A—Well, I had very definite knowledge of the whole matter at the time. I am not able to state just now all and, as to the dates, might be in doubt—a little indefinite. I was land agent of the company at the time and, under the orders of the company, I had commenced to sell the second time. The secretary, Mr. Underwood, was the first salesman, and under another order of the company was instructed or permitted to go to work and select the land, segregate the better portion from the poor, with a view of dividing them between the parties in the corporation.

16 Q—Perhaps my question is broader than I wanted it. I did not care for a history of the matter as you have it; what I want to know is just what occurred in relation to the sale of this land to this company?

A—Well, it was a purchase of one-half of it, on the part of these parties that came here, of the company; the title was made by the company through Mr. Ladd, the president.

17 Q—To whom was the title conveyed by them?

A—To several gentlemen.

18 Q—Was it first conveyed to you?

Objected to as incompetent and not the best evidence.

A—It was first conveyed to me; the grant at the time of the sale was conveyed to me, and by me to the parties who had been applying to the company for the purchase.

19 Q—What was the consideration for the land?

A—The first sale was one-half of the remaining portions of the grant, and that consideration, as I recollect it, was something like one hundred, or one hundred and twenty, or one hundred and twenty-five thousand dollars. I do not recollect the definite amount.

20 Q—What is the fact as to whether that sum of money was paid?

A—The amount I sold it for was paid to me through Mr. Ladd's bank, and the amount I paid for it was paid to the company through the same bank.

21 Q—What amount was it you sold it for?

A—One hundred to one hundred and twenty or one hundred and twenty-five thousand dollars.

22 Q—And that sum was actually paid for the land?

A—It was actually paid in over the counter. I saw the money at the time. It was not paid into my hands nor did I put the money into the hands of the parties, but it was passed in by certificates of deposits or checks on the bank.

23 Q—What I am getting at is that the payment was made in form?

A—The payment was made; yes, sir.

24 Q—And how about the next payment; how much was the other half sold for?

A—For a like sum, as I recollect it, one hundred thousand dollars.

25 Q—Making a total of how much for the whole land?

A—Making two hundred, two hundred and twenty or two hundred and fifty thousand dollars.

26 Q—You are not positive which it was?

A—No, I am not. I could not say until I saw the papers.

27 Q—State whether or not the whole amount of the purchase price was paid by these purchasers for the land?

A—They paid me the whole amount.

28 Q—Have they paid it?

A—They have paid it. I would say, however, so far as the last amount was concerned, that Mr. William Parks was not up and had nothing to do, so far as I know anything about it, with the negotiations.

29 Q—I was speaking simply of the payment of the money. What I want to show—if it is a fact—is that the company who purchased this land paid the price for it—actually paid the money?

A—Yes, they did.

30 Q—Now, Mr. Pengra, I will ask you to state if you know whether any or either of these gentlemen, Mr. Colby and his associates, named in this bill, had at the time of the purchase, so far as you know, any knowledge or reason to believe or any information to the effect that any fraud or misrepresentation had been made by any persons interested for the company or by the agents or officers of that company to the governor to induce him to issue certificates of the completion of the road?

A—If there was any such information abroad in the world I did not know it—outside of the Board of Directors. I know that I was present during all the matter of the conference over the question of sale, and my recollection is there were questions asked in relation to the title, the method and manner of securing the title; and the record showed and I think the secretary of the company, who is now Captain Drake, read the reports of the different seasons that the work was under progress, showing what the cost of construction had been, and the final report of completion of construction under Superintendent Odell.

31 Q—What I wish to call your attention to, Mr. Pengra, is this: I want to know whether any of these people had any knowledge or notice that there was any fraud of any sort practiced?

A—That inquiry was answered by the company to the effect that the road was completed from every source and

information that they were in possession of. They had no knowledge that I know anything about. I was not, perhaps, conversant with all the knowledge they might have, but so far as my knowledge goes they had no knowledge of anything of that kind in any way, shape or form of fraud.

32 Q—Had you, as a representative and land agent of the company, any knowledge or information of any character to the effect that there had been any fraud whatever practiced on the part of the company or its agents or officers for the purpose of inducing the governor to make his certificate of the completion of this road?

Objected to as incompetent and immaterial.

A—I had knowledge—it was not very perfect, I might say—that there had been an attempt made to obtain a certificate from Governor Woods prior to the completion and construction of the road; and my recollection now is that I obtained that knowledge on some action of the board of directors long prior to this sale, from the questions coming up in relation to the disposal of some amount of stock that the company had been compelled to take back that was being transferred to other parties. I made inquiry, I recollect, and met it as an unfortunate proceeding of the board, and succeeded in having it stopped; did not look to me to be a very honest and honorable one. I think I raised the question in regard to whether they proposed to let the road go in that shape. It was not completed then except out to Goose Lake Valley, as I recollect.

33 Q—We are not speaking of the completion of the road, Mr. Pengra.

A—Well, that is the explanation of my language in relation to the question of fraud, and I want it taken down. When I testify on a subject and make a statement, and I am asked what I know, it is necessary for me to explain it, so that you will understand what that was.

34 Q—I simply ask you whether you had any notice of any fraud having been obtained in getting the Governor's certificate, and that is your answer to it?

A—There was an effort of that kind, as I understood it, but not accomplished.

35 Q—At the time of the sale to these people neither they nor any of the parties associated with them had to your knowledge any notice of any fraud or anything of that kind?

Objected to as incompetent by complainant.

A—I hope you understand that I have said there was no such thing as fraud perpetrated, that there was some movement that seemed to look in that direction, and therefore when these people purchased there was no fraud. The company in its action was not stained with fraud; but what was attempted was not accomplished, and the road had been completed afterwards; I made a point that it should be.

36 Q—I am not asking that question, Mr. Pengra, as to the completion of the road?

A—Well, these people, so far as I know, had no knowledge of that fact, of any fraud.

37 Q—And you yourself had none?

Objected to as leading.

38 Q—So far as the issuance of the certificate finally was concerned?

A—No, sir; I had no knowledge of the completion of any fraud. All my knowledge was the reverse of that.

CROSS-EXAMINATION OF B. J. PENGRA.

Questions by Mr. Tanner.

39 Q—What official position did you hold in the Oregon Central Military Road Company at the time of this alleged sale to this California syndicate?

A—I was land agent of the company at the time, as I recollect the position.

40 Q—Was the alleged title to all the lands covered by the grant in you at that time, or only half of it?

A—At the time of the first sale to me there was a conveyance of half of it to me at that time.

41 Q—When was the first sale made with reference to the half that you speak of?

Mr. MALLORY. I think that is set out in the bill as May 12, '74.

Mr. TANNER. I think it is admitted to be the 12th of May, 1874.

A—I cannot gather up that date just now. Is that date taken from the record of the company?

42 Q—That is the date of the deed to you.

A—Well, the deed of the company to me was made some three or four days before the record in the office at Eugene City; and if that was the date of the deed, it was undoubtediy the date of the sale. I think my deed to them was on the same day or a day or two afterwards, for we went immediately to Eugene City from here, where I obtained my wife's signature to my conveyance to them, and it was put on record there.

43 Q—Both together?

A—I think they were.

44 Q—That deed to you that you had at that time was supposed to convey one-half of this grant, was it?

A—Yes, sir; the deed was made out by Senator Dolph, then our attorney.

45 Q—How long after that was it that you deeded this half of the land to these California purchasers?

A—That was the time I am speaking of. The first half of the land was deeded to them at the same time, or certainly not more than two or three days apart, that the conveyance was made to me.

46 Q—Had the lands been bargained for at the time they were conveyed to you by these California people?

A—Yes, sir.

47 Q—How long prior to that time, namely, the date of this deed, had the lands been bargained for by these California people?

A—I knew nothing of the California people until I met them at Salem, some two or three days prior to this time. There was a gentleman by the name of Walker that was the agent of the company to negotiate the sale, and he came through to my place at Eugene City and notified me, as the agent of the company, that he thought he could perfect a sale to these parties. There had been prior talk between him and me in relation to the matter at the time power of conveyance was given to me, before that, and gave me the

names of parties; they were strangers to me. I came down, and when I went up to Salem I went to meet them with reference to the conveyance the State was making of swamp lands; and there was some matter mentioned in regard to the possibility of purchases, and the probable amount they would have to pay. They came down and commenced negotiating with the company, and did not succeed in closing the arrangement. The company then conveyed to me and I to them.

48 Q—You do not know, then, how long previous to that time the lands had been bargained to these defendants, do you?

A—There was no completion of any bargain but as between me and them. My recollection is that the dates given me here is about the time, but I cannot call it up definitely. The arrangement was made between me and them when we were here present, immediately upon the conclusion of the company that they did not want to convey to them upon the terms offered, and the company conveyed to me, and immediately afterwards, certainly not more than two or three days, there was an arrangement closed between me and them.

49 Q—Was you acting for the company or for yourself individually in making this sale to them?

A—Well, I acted in part perhaps for both; for we were all united in the ownership of the lands, and we wished to dispose of them. We had completed the construction of the road, and we could not agree as regards the system and method of disposing of the lands; and they were determined to sell the lands so as to recover the amount of funds they had put into them; that was just about what they did by that; wanted to get the money back. And when I made the conveyance I made it with full knowledge of the fact that I could obtain the lands; and the bargain between me and these gentlemen, as it could not be closed between them and the company, the matter of whether it could be closed between us upon somewhat different terms was a matter under consideration; and therefore, as I was trying to help the company to dispose of the lands to them, and was their agent, it might be said of me that I was working in my own

interest and in the interest of the company when I made the conveyance.

Q—Then, as a matter of fact, the deed of this half of these lands was made to you as a matter of convenience in effecting the sale?

A—It was not a matter of convenience, but a matter of necessity to the final completion of the sale.

Q—You did not, as a matter of fact, yourself pay the company any consideration for these lands, did you?

A—I certainly did; I certainly did. What I received—the method in which I received it—in the form of checks, etc., was paid over to the company for the lands.

Q—That is, you mean the money that was received from the sale of the lands to these California people?

A—They had funds, it seems, in bank. I never saw those funds. I cannot recollect now what shape they were in.

Q—What funds are you speaking of?

A—Funds of those gentlemen who came to negotiate the purchase had; the amount of credit they had at the bank. I don't know what shape the funds were in.

Q—What I mean is, you did not pay the company anything for those lands outside of or over and above what was paid for them by these California gentlemen, did you?

A—I did not pay the company any more than I received at the time of sale; but I did pay the company through the bank, out of the bank, the funds that were carried to my credit, as I supposed, without looking at the books, by the bank at the time of the payment to me by the purchasers. That I had carried to the credit of the company; that was the method of the conveyance; and I understood that that was credits on banks in California.

Q—How much was that, Mr. Pengra? How much did you turn over to the company?

A—I have already said that it was from $100,000 to $125,000.

Q—For this half of the lands?

A—Yes, sir.

Q—You say none of this money was as a matter of fact paid over to you at the time of this payment?

A—There was not any of it passed into my hands at all; not a dime of it; that is, individually; it was passed to my credit.

Q—What position did Mr. Ladd hold in the company at that time?

A—President; authorized to make sales by order of the board.

Q—What was this controversy you spoke of in the board of directors of this company with reference to the sale of these lands?

A—Well, the question of the form of title—the form the title was to take—had been a question of discussion. I do not know that I could explain it all fully; I was not present all the time.

Q—Do you mean with reference to the kind of deeds that should be made?

A—Yes, first that came up.

Q—What was that about?

A—Well, they wanted——

Q—Whom do you mean by "they"?

A—The purchasers; those who were negotiating to purchase; and I stated that that was Mr. Colby and Mr. William Parks, in the interest of other parties. I do not know, but it seems to me I heard but very little about the names of anybody until the conveyance was made by me, and then the list of names to whom I was to convey was furnished to me; and the first questions that came up was the question of conveyance. Our folks declined to make anything but a quit-claim, and yet our record shows that we had been selling lands and giving warranty deeds. But if I recollect, the conveyance to me was finally a quit-claim, and mine to them; I think they were pretty nearly identical so far as that part was concerned.

Q—You mean by them, these purchasers?

A—These purchasers, yes, sir; who finally tried to negotiate with the company.

Q—You say these purchasers at first declined to take a quit-claim deed?

A—They wanted a warranty deed, and our records show that we had been making such; but our company declined

to make anything but a quit-claim for the reason that a portion of the title to the lands was not obtained from the government at that time, and for other reasons; I do not recollect what they all were.

Q—Were those reasons given to these purchasers?

A—This matter was discussed and the records looked at.

Q—Which one of the purchasers, or whom?

A—Both Mr. Parks and Mr. Colby; they looked over the records together.

Q—You explained to them, did you, that patents had not been issued for a large amount of those lands?

A—I explained to them that the conveyance to the state was precisely the same under our laws and the decisions of the court as that of patents; and at that time there was a movement on foot—and whether it had gone into effect or not I did not know—with a view to authorize the patenting of the lands by the government. That was a general movement, as I recollect it, and taken by Nesmythe in the United States senate. I understand advantage has been taken of it by some people, but it did not advantage the title to any extent.

Q—Was the matter discussed that a large quantity of these lands had not been surveyed at that time?

A—Yes, sir.

Q—These purchasers understood all that?

A—They understood everything; everything was explained to them; they saw the amount of titles that had been approved by me, what shape they were in, in what form they were finally issued to them; that where lands were filed on, they were filed in triplicate, as required by law, and the titles had passed to the state, certified to, as was the form with all grants up to that day.

Q—You showed those purchasers the books of the company and explained everything to them and kept nothing back, did you?

A—The company did in my presence. Nothing was kept back at all. There was nothing said in relation to the question of fraud specially, and anything that was said to them must have been in answers to any questions that they put incidentally, that everything had been carried through in perfect order finally.

Q—What do you mean by "everything" in your answer?

A—That the transactions, the matter of the survey and location of the line of road, its construction and completion of the title, had been in strict conformity to the law.

Q—That matter was discussed, was it?

A—Yes.

Q—Between the company and these purchasers?

A—Yes; and these matters had been discussed prior to that by the company.

Q—What date did you say that was?

A—I say that discussion, so far as these parties was concerned, was at the time of this sale, and it was stated to me that this sale took place at a certain time.

Q—May 15, 1874?

A—May 15, 1874.

Q—Where did that discussion take place?

A—In the rooms there in Mr. Ladd's bank, in the back office, adjoining the bank room. There was present the directors of the company, all of them so far as I recollect.

Q—You say this sale was really negotiated by Mr. Walker?

A—Mr. Walker was authorized to negotiate a sale, and had opened a negotiation for that purpose as I understood from him, and afterwards took it for granted, not perhaps from anything they said, but by their coming here; and after the arrival of Mr. Parks and Mr. Colby, the question of their purchase I think was mentioned to me in Salem, when I met them in relation to the swamp lands, and they came to Portland and then made the attempt at negotiation with our company.

Q—Who was this Mr. Walker? What was his other name, do you know?

A—No, sir, I do not know.

Q—Do you know where he is now?

A—I have not known where he was since the winter following, I think, or the winter but one following. I met him in Washington City, and he attempted a fraud on me, and he succeeded so far as the fraud was concerned.

Q—He was up to fraud somewhat, then, was he?

Objected to as incompetent by counsel for defendants.

A—I do not know anything about it except that one transaction. He did not perpetrate any fraud on us, because he did not deal with us any farther than to obtain the opportunity of bringing these men to make the negotiation, for which, as I recollect, he did not receive anything.

Q—What was his business, if you know, at that time?

A—I do not know anything at all about that; perhaps he was like most of our citizens here, dealing in real estate. For anything I know, that is all the business he had; I was not acquainted with Mr. Walker except as I met him.

Q—Where did he live—in Oregon or California?

A—I cannot tell you that; he claimed to me to live somewhere in the vicinity of or at Chicago.

Q—Had he ever been in Oregon that you know of before, until he came up about these purchasers?

A—I never saw him until he came to my house to get explanations in regard to certain filings on swamp lands, two or three months prior to this sale; only a little before.

Q—How did it happen to be put into his hands to negotiate these lands?

Objected to as immaterial by defendants.

A—It came around in this way. He had the offer from a gentleman by the name of Owings of a large amount of filings. He came to me to inquire as to the value of the lands and the character of the lands, that Owens filings rested on.

Q—You mean swamp lands?

A—Yes, sir. Now as to the other matter, I suggested to him that the filings of Mr. Owens were not very valuable, if the matter was followed; and a great many of those filings I saw from the presenting of them to me was on lands that were included within the limit of the grant; and I suggested to him that if he wanted those lands, the only way of getting them would be through our company, and I thought it would be far better for any one to purchase the grant. That is the way it came up.

Q—Then he had his authority from you, did he?

A—No, sir, not at all; he came on down to see our company, and they issued that authority against my advice, and stopped the course of procedure that I was authorized to

institute and had under way in the sales of lands; but sold the grant at a thundering sight less than the lands were worth, and hurt me, and I didn't want it.

Q—You say the grants were worth a great deal more than the company received for them?

A—Oh, a great deal more than the company received for it.

Q—How much more in your judgment?

Objected to as incompetent and not proper cross-examination.

A—Oh, that is a mere matter of my opinion at the time, and that opinion was based on prospective values.

Q—You say this Oregon Military Road Company was the one that engaged Walker to negotiate the lands, was it?

A—The Oregon Central Military Road Company. He came down here, and they afterwards wrote to me that they had put into his hands some authority to sell, and wished me to stop proceeding to sell; and I understood by that, that they had done it.

Q—When was this other half of the land sold, and how was that title to that at the time it was sold? Was that in you at the time also?

A—Not at the time Colby came; Mr. Parks was not with him. He came and wanted to look over the grant with a view to selling it; but at the time of the sale it was understood they would convey the other half of the grant to me, and by me, with Parks and Colby, that I would convey it to them, if they desired, at the same rates, or perhaps something more; I don't know just exactly as to the rates, but it was about the same, as I recollect. In process of time Mr. Colby returned. As I recollect now, this first sale took place early in the season, and the balance of the sale was the same season later on, of the same year; it might have been the year following, but certainly not later than the year following. He came to my place, and I know I was just passing the mountains with my brother and a company of men that were engaged in the public surveys. So we took my team and express wagon, and went forward and got into the field before them. I now recollect that there was some of these swamp land purchasers wanted a large body

of swamp land surveyed, and I was going out on that account. So we went together and made a general inspection of the grant; and upon returning he told me he had about concluded to report favorably as to the purchase of the balance of the grant, and we parted, I think possibly at Goose Lake or in the Klamath Lake country. He might have returned all the way, but I think not; I think we parted there, and he returned to California. Afterwards wrote me that they had concluded to take the balance of the grant, and came up, met me, and we came to Salem, and was there some time. Came down and made some negotiations here with our people at Portland. All the matters were understood as to the price that we would sell at, prior to that, and the sales took place. I cannot now recollect whether those titles—the conveyances—were made as I stated to you; but the first titles were written by our attorney, and I think they were the last time, but I am not certain.

Q—Did you see any part of the money paid on this last purchase?

A—The last sales are indistinct in my mind as to the transfers, whether they were at Salem or down here, and the method and time of payments. The important point was the question of the first sale, and whether we would sell the balance; and it was all understood; when they purchased the first, they had a written understanding on our part by the company to me, and by me to them, that we would convey the balance at the same rates; and we were under a certain obligation to do so; and I know that they took advantage of that proposition in the end. I think the money was paid at Ladd's bank, but I do not recollect.

Q—Was you present or not when it was paid?

A—As I stated to you, I cannot recollect all those things, but I think I was; I think I was present here.

Q—You did not see any money pass between them, did you?

A—No, I think not; I do not know but what I have stated with regard to money passing was the last time, but I am very sure it was the first. And whether I saw the money passing at the last, I don't know; but the bank furnished

me a statement of it, and I rather think I have a statement of it still somewhere.

Q—Did you see any money pass at either time between the parties?

A—I did, sir; I saw the checks as they passed.

Q—You did not see any money, did you?

A—No, I saw the checks.

Q—Do you know by whom those checks were signed

A—I did not look at them, sir.

Q—To whom were they made payable?

A—I do not know that even. The bank received them.

Q—How many checks were there?

A—I cannot tell you; there was quite a number. I recollect this much now, that some of the checks were checks of Lunning of San Francisco.

Q—Did you ever see the checks afterwards?

A—I never did to my knowledge, but it seems to me as the matter comes up to my mind—for this is a long time ago and I have not been thinking about it at all—that some of the funds were sent up in the last purchase some time after Colby's return to San Francisco. I understood that a portion of the checks came from the house of Rideout & Co., at Marysville, at that time, but I did not look at them to see the amount of them—nothing of the kind. I did receive money on those funds in the amount of several thousand dollars—six, seven or eight or nine thousand dollars from the bank, paid to me sometime afterwards. However, that was the amount due me for the stock I held in the company.

Q (By Mr. MALLORY)—A part of the proceeds of this sale, was it?

A—It was funds, yes, sir, received by the company.

Q—You do not know what funds it was, do you?

A—I know that the only funds the company had was the proceeds of this sale. They were out of funds at the time and had been borrowing. They had paid the funds they had been borrowing, and paid the parties the amount due them upon the amount of stock they held in the company.

Q—You do not know who furnished those funds, do you?

A—I just told you that it was the only funds they could

have had, and those funds must have come to them through the bank.

Q—From whom did the funds come to you?

A—From those parties, as I have explained, the same funds I paid to the company. That was the funds they had on hand, and in the closing of their accounts they paid over to me the proportion due me.

Q—Well, who did?

A—The company.

Q—Who sent that money to you?

A—It was not sent to me. I received it here at the bank.

Q—Who gave it to you?

A—The bank; Ladd & Tilton's bank. I was borrowing of them myself at the time, and they carried to my credit the amount due them, and the balance was paid to me.

Q—Then the bank furnished the funds to pay you, didn't it?

A—The bank furnished the funds that were deposited there by the company for that purpose.

Q—Who was the treasurer at that time?

A—Mr. Ladd.

Q—Also the president?

A—The president. I think he was the treasurer, or else one of the other members of the company might have been, perhaps. I recollect now that the old clerk of the Oregon Steam Navigation Company, as it was then, was an officer there, and he might have been the treasurer. I cannot think of his name.

Q—(By Mr. MALLORY)—Mr. Wygant?

A—Wygant; and I don't know but he was treasurer at that time. Mr. Ladd had been treasurer, at all events.

Q—Did you ever see any of these other purchasers or parties that were interested in this purchase, except Colby and Parks?

A—Yes, sir; and conversed with them.

Q—Who were they? I mean before the sale took place?

A—Oh, no; I never saw any of them before that.

Q—The only parties you had any conversation with or talked with before the sale took place was Colby and Parks?

Q—They were the only persons I ever knew in connection with it, except they named other parties who would be their partners in the purchase. I afterwards became acquainted with the gentlemen there who talked with me, who were interested in the company.

Q—How long were you acting as land agent?

A—I cannot tell just how long I was; I think, however, not more than a couple of years.

Q—What were your duties as land agent?

A—It was selecting and filing upon the lands known as lands in place, within the limits of the grant, and those outside to which we were entitled, or lands that had been taken—indemnity lands. And making out papers, listing and making out lists in triplicates, forwarding them to the different land offices and keeping one; sending two to Roseburg, for instance, one copy of which was sent to the office at Washington; and then, in connection with it, corresponding with the Interior Department, forwarding copies of filings to Senator Corbitt, whom I enlisted to take special charge of the matter of perfecting titles with as little delay as possible. Prior to this we had authorized a gentleman in Philadelphia to sell the grant; a gentleman who was at the head of the government mint—I forget his name now.

Q—Did you employ any one else in Washington to aid you in perfecting title to these lands?

A—I think not; that and my correspondence and personal conference with the old Commissioner of the General Land Office was all.

Q—How long were you superintendent of this company?

A—That commenced with the life of the company, and, I think, continued to the death of Judge Stratton—I know it did; but I don't know just the length of time. Perhaps it was only about three years.

Q—What were your duties as superintendent?

A—First, the location of the road and its survey; exploration of the country for the purpose of location; afterwards to make the maps, file them with the State and the Department at Washington; for all these papers, filing and location, was made with the government and not with the State. And those maps, after having received the approval of the

government of the State, were forwarded to Washington from time to time; and upon the approval of the construction along in divisions by the different governors, maps of those constructed divisions were furnished. And the certificate of approval was placed upon them and the certificate made by the governor. It was carrying forward that work, perfecting it, obtaining those certificates, and filing them properly in the departments.

Q—Was you president of the company at any time?

A—After the death of Judge Stratton until the period of its removal from Eugene City. This matter that has been spoken of I believe is the matter that was attempted to be organized while I was president, in my absence.

Q—You mean this fraud that was attempted?

A—Yes; under the question of Mr. Mallory. And that was one of the particular reasons of my strenuous effort to check it, and succeeded in doing so.

Q—Who superintended the alleged construction of this road—the first part of the construction?

Objected to as immaterial and not cross-examination.

(Question withdrawn.)

Q—Did your duties as superintendent require you to superintend any part of the construction of this road?

A—It certainly did; but in the midst of that I had assistant superintendents and constructors, foremen of construction; I had an assistant the season that the work began; I left him in the field. That was Mr. Rigden.

Q—What part of it did you superintend, if any?

A—I superintended the whole of it, in that sense.

Q—I mean in person?

A—From the commencement, to begin with leaving Mr. Rigden, returning immediately upon the conclusion of exploration——

Q—I am speaking of the construction, now, from general work?

A—I am answering you. As I returned I examined the whole of it, and discharged Mr. Rigden, declining to accept a portion of the work that had been done at the time, and then continued my superintendence of construction.

Q—What part of the road did you superintend in person?

A—Under my superintendency the road was constructed from Eugene City to the Deschutes, and I think that portion through to Goose Lake was under my superintendence; at least, if it was not, I was president from there during the time, and I went into the field and took charge of the construction beyond that, notwithstanding my being president of the company.

Q—You were familiar as superintendent with all that was done with reference to the construction of this road then?

A—Yes; up to the time of the construction to Goose Lake valley, or near that; or Sprague's valley at least.

Q—Did this company, the Oregon Central Military Road Company, keep a set of books?

A—Yes, sir.

Q—Those books were exhibited to these purchasers, were they?

A—Such portions of them as were requisite, looking to the question of title and the question of the management of the affairs.

Q—Did those books show the expenditures in the construction of the road?

Objected to as not the best evidence; incompetent, irrelevant and not proper cross-examination.

A—They do.

Q—Where are those books; do you know?

Same objection.

A—Well, I think they have all been filed with and are in the office of Mr. Ladd; except, perhaps, two or three of them that remained in my hands and never turned over. At least, they are in my hands yet, at Springfield.

Q—What books are they?

Same objection.

A—No; they are here; all except the record book I started to keep at the time I began selling. Well, it was the record of sales by Mr. Underwood, and I think it was his record of the location of lands, which was imperfect; and I stopped them and withdrew his filings. I know that there are two or three books, and one of them is the sale of lands to a certain extent by Mr. Underwood; but the secretary's books, showing the accounts of the company, and the ex-

penditures, was last, to my knowledge, in the hands of Capt. Drake, and I think, left at the bank of Ladd & Tilton. Capt. Drake is still living, and the books are undoubtedly here.

Q—You say some portion of these lands had been sold to private parties before this sale?

A—Yes, sir; I was one of the purchasers myself.

Q—How many such sales have been made?

Objected to as immaterial, irrelevant and not proper cross-examination.

A—Quite a number; I could not say.

Q—Well, about how many?

A—The acreage I could not give you any idea of.

Q—I do not want the acreage, but how many in number? How many sales—how many people bought?

Same objections.

A—I could not state the number of sales; my recollection is that the amount of the sale was something over $5000 perhaps. Somewhere from five to seven thousand.

Q—You say warranty deeds were made in these instances?

Objected to as immaterial.

A—Yes, sir; I have a warranty deed from them. Those sales were made under Underwood's administration, all but two or three of them.

RE-DIRECT EXAMINATION OF MR. PENGRA.

Q—I will ask you in that connection: The lands so sold were along the lines of land that had been drawn and listed by the company?

A—All, so far as I recollect; I think they were all within the limit of the grant.

Excused.

B. J. PENGRA.

Whereupon further proceedings herein were adjourned until 10 o'clock to-morrow morning, August 8th, 1891.

GEO. H. DURHAM, Examiner.

William C. Belcher, a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION,

Conducted by Mr. Mallory:

Please state your name, age, residence and occupation.

A—William C. Belcher. I am over 60 years of age. My legal residence is Marysville. My business residence is in San Francisco. My occupation lawyer, and has been for over thirty years.

Q—Are you party to this suit?

A—I am a nominal party to the suit, and am a member or stockholder in the corporation which is the real defendant —the California and Oregon Land Company.

Q—Do you know of the existence of a corporation known as the California and Oregon Land Company?

A—I do; I have known it, and have been a stockholder in it since its first organization.

Q—What knowledge, if any, have you of the defendant—the California and Oregon Land Company—or the parties from whom it acquired title, having purchased and being the owner of a quantity of land granted to the State of Oregon by the Congress of the United States by an act approved July 2, 1864, to aid in the construction of a military road from Eugene City, in the State of Oregon, to the southern boundary of the State of Oregon, being the land referred to in the bill filed in this cause? If you have any knowledge upon that subject please state in full.

A—I knew of the original negotiations and was a party to them, and of the transfer of the title from the parties who were the original purchasers from the Oregon Central Military Road Company. The matter was brought to our attention by a man by the name of Walker some time early in the month of May, perhaps a little earlier, in the beginning, that there was a grant of land of that character here for sale and that we could become the purchasers of one-half of it for $100,000 or the whole of it for twice that sum—$200,000, and he brought with him an abstract of title which was submitted to me, I think, now, first. That is, before it had been submitted to any of the other parties—although I am not sure about that—for examination. And along with that a map of the location of the road, certified, perhaps, by the governor, but I am not certain as to the certification. For

myself and for others who were interested with me in the matter, I examined the abstract of title and the maps. Some short time after, I could not now fix the date, but I should say in the month of May, 1874, the several parties who had agreed, or who were about to agree to make the first purchase of the undivided one-half, met at Sacramento, and there, after consultation, we agreed to become the purchasers, each of an undivided tenth, I was going to say, but I remember now, that there were two parties who were to become the purchasers of one-tenth. No, that was in the second purchase; in the first each was to become the purchaser of an undivided tenth; and we agreed then to conclude the purchase, leaving only one question to be determined, whether or not there were any liens subsequent to the date of that abstract of title, and either at that time or very presently thereafter, for myself, and I think all the rest I can answer for, we gave either our checks or obtained bills of exchange on San Francisco for the amount of the money.

Q—Was that paid over?

A—That was paid over, and my present recollection is that it was to be paid here to the bank of Ladd & Tilton. I am very sure Ladd's name was on it, and whether I have the other name right or not I am not sure. The money was to be paid here, and on either certified checks or bills of exchange—probably on bills of exchange, which we obtained there.

Q—Was it so paid as a fact?

A—I so understood it to be; of course the money was paid, but whether it was so paid as a fact through the bank I could only know from the fact that our checks were returned.

Q—In the arrangement then made was any understanding reached concerning an option as to the purchase of the other half?

A—That was a part of the proposition, that in the purchase of the first half we should have an option within a certain limited time, and that probably six months or a year, although I am not now certain as to the time, within which to purchase the other half at the same price.

Q—State now whether or not you availed yourselves of the benefit of that option?

A—We did; in the month of October several of the parties to the first purchase became parties to the second purchase, and a few other individuals came in also to participate in that.

Q—What was the consideration?

A—$100,000.

Q—Was it or was it not paid by the parties who made the purchase?

A—I paid my part of it, and I think all the rest did so.

Q—What, if any notice, knowledge, information, suspicion or ground of suspicion had you or your associates in said purchases to your knowledge at the time of said purchase and the delivery of the deeds of said land, that said wagon road had not been seasonably and properly completed in accordance with the requirements of the granting acts, or that any fraud or misrepresentation whatever had been practiced or made by the officers, stockholders or agents of the Oregon Central Military Road Company or other persons acting in its behalf, or by any person, to procure the said certificate of the Governor of Oregon as to the construction and completion of said road, or upon the Commissioner of the General Land Office, or upon the Secretary of the Interior, or either of them, to furnish lists of land mentioned in the bill of complaint, or upon the President of the United States to procure patents of land as in the bill charged or otherwise?

A—During those negotiations, or the negotiations for these purchases which were made in May and October, and at the time of the completion of the purchase and the delivery of the deeds, I had not, nor do I believe that any one of my associates had any knowledge or information or suspicion, or any notice of any kind, that there had been any fraudulent act committed, or any misrepresentation made, or any wrong done, in any respect, with reference to these lands, either by misrepresentations to the governor to procure his certificate made by the officers or any one of the officers of the Military Road Company, or any of its agents, or any person in its behalf, or to the Secretary of the In-

terior, the Commissioner of the General Land Office, to procure listing of the lands, such as had been listed, or to procure from the President of the United States patents for any portions of them. If any suspicion, even, had been suggested, that there had been any wrong-doing anywhere, in respect to these lands, or that there was anything wrong about them, or any suspicion to be cast upon the title, I am certain for myself and for my associates, we should never have dealt with the lands at all; we should have thrown up the business at once. I was intimately acquainted with most of those gentlemen, and know that they were careful business men, and that they would have had nothing to do with any business transaction of the kind about which there was the least suspicion. Now at the time of our meeting in Sacramento the question of the propriety and convenience of making the purchase was discussed among ourselves as a business transaction. We had there an abstract of title and the maps, showing the location of the road, and I am very certain that there was not so much as a breath of suspicion cast upon any of the certificates; and as we had there the certificates of the governor in the abstract of title, and the letter from the Commissioner of the General Land Office, and a statement that a certain quantity of the lands—if I remember now, over 300,000 acres—had already been listed and no portion of it patented, because at that time the act authorizing the patenting had not been passed, at the time of our purchase, although it had been before the second purchase.

Q—Upon what did you rely, now, in making this purchase?

A—Upon the abstract of title very largely, and upon the certificate of Messrs. Mitchell and Dolph, the attorneys to whom it had been submitted for examination and an opinion, and who had given an opinion attached to the abstract.

Q—Have you that abstract and the opinion with you?

A—I have. (The witness produces the record and hands it to counsel.) There are two certificates added by county clerks there that were not there when the paper was presented to us.

Q—Counsel for defendant presents a paper marked on the

back "Abstract: California and Oregon Land Company to lands Oregon Central Military Road." I will ask you to state if the paper so described is the abstract to which you have referred in your testimony and upon which you relied in making these purchases?

A—It is.

Q—You may state what the certificates are which were added since?

A—First is the certificate of J. N. Dolph, dated Salem, October 19, 1874; and the next is the certificate of Joel Ware, County Clerk of Lane county, dated 22d of October, 1874; and the other is the certificate of E. D. Foudray, County Clerk of Jackson county; and the whole, with the exception of these three certificates, was the paper as we had it before us.

Mr. MALLORY. I want it to appear that this paper is offered only for the purpose of showing what these purchasers relied on at the time they made the purchase; and they are not offered for the purpose of proving the facts contained in them, but simply offered to show what they relied on when they purchased.

Counsel for the complainant objects to its introduction as immaterial and incompetent for that purpose or any purpose.

Q—Are you able from any data you have, or from your memory, to name who were your associates in each of these purchases?

A—I have examined the deeds, and from those and my recollection, I can give the names. I have a memorandum here which contains the names, and as to most of them, I remember them.

Q—Please state, then, who were your associates in the first purchase?

A—G. W. Colby, John Boggs, Wm. H. Parks, N. D. Rideout, W. H. & R. F. Parks for one-tenth, Edgar Mills, E. B. Pond, Nicholas Luning, T. B. Simpson and myself, if I remember rightly, were the only ones. Now for the second purchase: G. W. Colby, Nicholas Luning, E. B. Pond, J. M. Peck, Isaac Allen, B. F. Baker and M. P.

Jones, C. H. Holbrook, W. C. Belcher, N. D. Rideout and Isaac Lohman.

Q. Where was this purchase finally consummated? In California or Oregon?

A—It was consummated by the delivery of the deeds in Oregon, I suppose, although I was not present at the time.

Q—Where was the contract for the purchase consummated?

A—In California.

Q—Were the terms of the purchase of the whole tract settled upon at the time the first negotiations were had?

A—They were. Both were agreed upon. That is, it was agreed then to purchase the first with the option to purchase the second at the same price, if we should so choose.

Q—Were there or not any new negotiations as to terms about the purchase of the last half?

A—None at all, so far as I know.

Q—Through whom, if you know, was the deed finally conveyed to your company or the business transacted in this city?

A—Through William H. Parks or Colby or both; I am not certain as to which.

Q—What was the extent of their authority to act for those purchasers?

A—Simply to find if there were any subsequent liens upon the property, and if there were not, to pay the money and accept the deeds.

Q—Did or did not the same parties transact a similar business in the matter of the second purchase?

A—I think so.

Q—You are not certain about that, are you?

A—I am not certain whether it was one or both at the first time, although my impression is it was both.

Q—What was the extent of the authority of the party that did complete the transaction here of the last purchase?

A—Only to determine if there were any subsequent liens on the property.

Q—And receive the deeds when the money was paid over?
A—Yes, sir.

CROSS-EXAMINATION OF MR. BELCHER.

Questions by Mr. Tanner:

When was you first in Oregon, Mr. Belcher?

A—I cannot tell you how many years ago it was.

Q—Before or after this alleged purchase?

A—Since.

Q—You had never been in this State then up to the time of the purchase.

A—No, sir.

Q—Who was this Mr. Walker you spoke of? What was his other name?

A—I do not now remember his name. Since the matter was suggested here yesterday I have exercised my memory as best I could to remember what it was, but I cannot recollect it.

Q—Do you know what has become of him?

A—No; I have never seen nor heard of him in quite a number of years.

Q—Did you have any particular acquaintance with him at the time of this purchase?

A—I knew him before; had known him in California probably for two or three years.

Q—Where did he reside?

A—He had resided for a short time in Marysville, and in some way been connected with business there; but where he was residing at that time, unless in Oregon, I do not know. He came from Oregon as the agent, as I understood, of the Oregon Central Military Road Company, and for the purpose of negotiating a sale of their property.

Q—Whose attention did he first call to this land grant, do you know?

A—Whether he called any others before mine I do not know; but I know that he did call my attention to it, and presented the papers for examination, and suggested that it would be a good purchase to make, although the particular inducements which he made, or what he had to say, I do not now remember.

Q—Was this bargain or agreement which you say you made with him, in writing, about the first purchase of half of these lands and your option for the second half?

A—There was no written agreement made as to the first, to the best of my recollection; and whether there was as to the second I cannot answer positively. I should say yes, but I am not certain.

Q—Was not Colby and Parks your associates in this purchase?

A—Both of them.

Q—Were not they sent up here to consummate the matter and complete the bargain and purchase that was made of the lands?

A—One or both of them were coming here on other business, if I remember correctly; and they were authorized to represent us so far as to say that there were no subsequent liens upon the property, sales or liens, and if none were found then to receive the deeds; or the first deed, which would be the first half.

Q—Don't you know that Mr. Colby and the company here, the Oregon Central Military Road Company, and Mr. Pengra, had a controversy about the kind of deed that should be made?

A—That I did not know about.

Q—You heard Mr. Pengra's testimony yesterday?

A—I heard his testimony; yes, sir. The one form of deed is the only one I have ever had anything to do with, and that is the deed which we actually received.

Q—Well, after Mr. Colby came up here about this purchase did not this question come up about the form of deed, and Mr. Colby first insisted on a warranty deed, and finally accepted a quitclaim deed? You do not know whether that is true or not?

A—I have no knowledge whatever in regard to the matter.

Q—Mr. Colby was agent of this syndicate, was he not, for the purchase of these lands?

A—No, sir; no, sir.

Q—Whom was he representing then in the transaction?

A—He was the agent so far as I have already stated; that

is, to examine and see if there were any subsequent liens or conveyances, or to cause an examination to be made.

Q—He was interested to the extent of one-tenth, was he not?

A—Yes, sir; and acting thus far for himself; but I am very positive he never had any authority to act for me with the exception of the single matter I spoke of; and so for the others, because that matter was discussed at our meeting when all were present.

Q—How was this first $100,000 made up?

A—It was made up, so far as I am individually concerned, by procuring, or by giving my own check for the amount of money.

Q—Do you know personally of your own knowledge whether the others put up theirs or not?

A—I do not think I do, with the exception, perhaps, of Mr. Rideout. I think that the transaction was made by me through Mr. Rideout's bank in Marysville, and that I knew of his as well as my own. As to the others I have no individual knowledge.

Q—Is not that true of the second hundred thousand?

A—As to the second $100,000, I paid my money there, also; and my impression is that I paid that through Mr. Rideout's bank. I know that I paid the money.

Q—You do not know of your own knowledge whether the others paid theirs or not, I suppose?

A—I think not; at least I have no present recollection of being present when either their checks or bills of exchange were handed in.

Q—Do you know of your own knowledge whether this money, or how much of it, reached the company—the Oregon Central Military Road Company?

A—I do not; I only know that we got a deed and we did not get our money back.

Q—Who all were present at the time you say you talked this matter over in Sacramento as a business proposition in regard to the purchase of these lands?

A—The names of the first purchasers which I gave. I am not certain whether they were all there or not.

Q—Did you have this abstract which you say was fur-

nished you by Messrs. Mitchell & Dolph there present at that conference?

A—I am not now certain whether that was present at the conference; but I am certain that I had it before for examination, and I have an impression that it was there at that meeting, but I could not answer as to that positively.

Q—What other papers, if any, did you have?

A—A map showing the location and improvement of the road, or an approved map showing a definite location of the road. No, as to that part, I did not describe it correctly, but it was a map showing the road and the lands lying along its sides; for it was under the first grant, the alternate sections for three miles on each side, and by the second grant, indemnity lands to the extent of six miles on each side.

Q—Was it determined at that meeting at the time of that conference to buy those lands?

A—That is my recollection.

Q—Was Mr. Walker present?

A—Whether he was present at that meeting I could not now state.

Q—You had no information that this road had actually been built at that time, except such information as you could obtain from these papers, had you?

A—I should say now, without being able to state definitely, that the statement had been made by Mr. Walker that the road had been completed for more than two years. But the paper was what we relied upon; the abstract of title.

Q—You sent no one up here to examine specially into the question whether this road had been built or not, did you, before you made your purchase?

A—No, sir. No, we relied upon the certificates of the governors and the certificate of the Commissioner of the general Land Office.

Q—Was the question as to whether this road had been as a matter of fact built or not, brought up or discussed at that meeting?

A—Not at all; it was assumed as a fact.

Q—At whose request was this abstract of title made and furnished, if you know?

A—That is more than I know; the paper itself probably shows, but I do not now remember.

Q—Where did you get that abstract?

A—I think Mr. Walker handed it to me.

Q—Have you ever seen this Mr. Walker since that time?

A—Yes, sir.

Q—When was the last time you ever saw him?

A—Probably a dozen years ago; but I could not give you the exact time; quite a number of years.

Q—Do you know as a matter of fact of your own knowledge whether this Mr. Walker had ever been over the line of this road or not?

Objected as immaterial and not proper examination.

A—I do not.

Q- You spoke of subsequent liens that you instructed Mr. Colby to look into? What liens did you have in mind?

A—The liens for taxes or any other liens that might appear of record or which might have been created so as to appear there.

Q—It was well understood by all of you, was it not, at the time of this alleged purchase, that the large portion of these lands had not been surveyed at that time?

A—It was understood that about 300,000 acres—three hundred odd, I don't now remember the quantity—out of the 700,000 and odd, or whatever the quantity was, had already been listed to the State of Oregon, and that other portions had been surveyed and not yet listed, and that certain other portions had not yet been surveyed by the government. But as to the relative quantities, that I could not give.

Q—Can you give the date of that meeting in Sacramento that you spoke of?

A—I could not, except that it was only a short time prior to the completion of that purchase; the deed bears date the 15th of May, 1874.

Q—It was shortly before that?

A—Shortly before that; but how long—what time intervened between I could not tell you.

Q—Do you know whether Walker came up here again with Colby and Parks or not?

A—That I do not know.

Q—Did you ever have any correspondence with Mr. Pengra or any of these other parties prior to the purchase?

A—No, sir.

Q—Or make any other inquiries than those you have mentioned in regard to these lands?

A—No, sir.

Excused.

It not being convenient for the witness to remain until the notes of his testimony were transcribed so that he could sign his testimony, it was agreed by and between counsel hereto, that the Examiner might sign for the witness with the same effect as if signed by himself.

(Sgd.) WM. C. BELCHER,
By GEO. H. DURHAM, Examiner.

Edward B. Pond, sworn on part of the defendants.

DIRECT EXAMINATION.

Questions by Mr. Mallory.

You may state your name, age, residence and occupation.

A—My name is Edward B. Pond, age 57, residence San Francisco, occupation farmer, and interested in banking and various other enterprises.

Q—Are you a party to this suit?

A—I am.

Q—Do you know of a corporation called the California and Oregon Land Company, the defendant in this suit?

A—I do.

Q—What relation, if any, do you now sustain to that company, or have you heretofore sustained to it?

A—President of it.

Q—Since when?

A—I think since its organization; it is just possible there may have been a few months or something in which I was not; but I think since its first organization.

Q—What knowledge, if any, have you of the California and Oregon Land Company having acquired a title to the land grant described in the bill in this case; if you have any knowledge about it, state all the particulars?

A—As to the original purchase of it?

Q—Yes, the manner of its acquiring and the circumstances?

A—Some time in the spring of 1874 Mr. Walker—I think his name is R. N., but I am not certain—came to California desiring to sell certain lands that had been granted by the United States to the State, and by the State to the Oregon Central Military Road Company.

Q—I will ask this question right here: Up to that time had you any knowledge of such a grant having been made—personal knowledge?

A—I had not.

Q—Now proceed with your former answer.

A—He came there, and had seen Mr. Belcher and some of the other gentlemen living in Marysville—at least he so told me, and they afterwards told me. He came to San Francisco, and I saw him there; he stated what he had to sell, and myself, together with a number of others, after talking it over, concluded we would get together at Sacramento and talk the matter over, thinking that if it looked as it seemed to on its face, that we would purchase the lands of this road company; we met there, nearly all. I would say, however, that I think there were two or three absent. I think Mr. Luning was absent, but he stated to me that whatever the rest agreed to do he would be satisfied with. And I don't think Mr. Simpson was there; but I am not positive. With the exception of those, I think they were all there. We met at Sacramento and talked the matter over for a considerable time, and finally decided that we would purchase the lands at the price offered, which was $100,000 for an undivided half of all the lands; with the understanding that we should have the privilege at a future time of purchasing the other half at the same price. Each of the parties who subscribed or agreed to buy a tenth was to pay in his $10,000, which was to be sent here and the purchase made. Subsequently that was done, so far as I know. I paid my ten thousand dollars, and I have reason to know, and do know, that others did too, and I believe all did. Subsequent to that, deeds deeding the property to us came to hand duly attested and recorded, etc., the money having been paid.

Q—Now you may state with regard to the second purchase?

A—The second purchase occurred in the fall following, October I think; we agreed among us, together with some few new parties who had small interest, that we would make that purchase as well; and it was subsequently made, I paying, I know, my share of it, and I have reason to believe all the others paid theirs.

Q—Through whom was your deed from the Oregon Central Military Road Company subsequently procured from the Oregon and California Company? Who transacted the business of getting the deed?

A—The first deed was obtained by Messrs. Parks and Colby.

Q—What was their relation to the business?

A—They were part owners and interested in the purchase; they had no other relation to it, except that they were to receive the deed, conditioned only upon there being found no liens against the property, the title being clear so far as we knew.

Q—How the second deed?

A—The second deed Mr. Colby, if I recollect right, was the party who came here to close that, to get the deed.

Q—What was his relation then?

A—Practically the same so far as I know.

Q—Had he any general agency other than that?

A—In this transaction?

Q—Yes; in this connection. I mean had he any other agency for the purchasers of this grant, other than to ascertain whether there were any liens?

A—No, sir; not that I am aware of.

Q—Now, what subsequently became of this grant of lands?

A—Sometime after that—I would not say exactly, but the certificate of incorporation is the best evidence of the date—it was decided the better in order to handle the property conveniently, and without being compelled to go around for deeds or leases, etc., that we would incorporate. The object of the corporation was to control and manage this property.

Q—Who were the parties that incorporated?

A—The owners of the land, with perhaps one exception.

Q—In what name did they incorporate?

A—The California and Oregon Land Company.

Q—Is that the defendant in this case?

A—Yes, sir.

Q—What disposition did the then owners make of the lands?

A—They deeded the lands to the incorporation, taking in return therefor certificates of stock for their proportions in accordance with the amount they owned in the grant.

Q—What, if any, notice, knowledge or information, suspicion or ground of suspicion had you or your associates in this purchase to your knowledge at the time of the purchase and the delivery of the deeds of the said land, that the said wagon road had not been seasonably and properly constructed in accordance with the granting act?

A—We had no notice whatever of any such statement.

Q—What, if any, knowledge, information or suspicion or ground of suspicion had you that any fraud or misrepresentation had been made by the Oregon Central Military Road Company or any of its officers or agents or persons acting in the interest of the company, or by any other person, to procure the certificate of the governor of the State that the roads had been properly constructed, when in fact they had not been so constructed?

A—No knowledge, suspicion, or the most distant imagination that such a thing could have happened or had happened. Had we ever had any such even faint suspicion, myself, and I believe the rest, being largely business men, would not have invested $200,000 in the property.

Q—What of any such representations having been made to the Secretary of the Interior or the Commissioner of the General Land Office, to induce the listing of the lands, or any such representations having been made to the President of the United States by any of the persons named to induce patents to be issued?

A—No such representations did I ever hear of in any shape, manner or form.

Q—What was your information, if anything, upon that

subject, and where did you obtain it, as to the fact of the road being constructed?

A—An abstract of title was furnished, Mr. Belcher having previously examined it previous to the meeting, as I recollect. I think, however, those papers were all present at Sacramento, which he has already described. I saw the abstract, if not then, at least very soon thereafter, and I think that is where I first saw it, at the meeting in Sacramento; together with that was a map of the road, and I believe there was attached to it a certificate of the governor certifying the construction of the road.

Q—Attached to the map, you mean?

A—Yes, sir.

Q—Now, upon what did you and your associates rely in making this purchase as to the title to the lands?

A—We relied upon the abstract of title which was furnished us, together with the map and the opinion of Messrs. Dolph and Mitchell that the title was in the Road Company absolutely.

Q—What of the certificates of the governors?

A—They were a part of the abstract, together with that of the Secretary of the Interior.

Q—Did they or not furnish any foundation for your opinion as to the title?

Objected to as immaterial.

A—Yes, they furnished us this abstract of title complete, setting forth the acts of Congress, the acts of the legislature, the certificates of the governor, and other matters contained therein.

Q—What was the total sum for this property?

A—In the original purchase, $200,000.

Q—Was or was not that sum actually paid?

A—To my knowledge a large part of it was paid; that is to say, to my personal knowledge I know that I paid, and I know that Luning paid; I believe that all the others paid their proportions; and I think if you could give me a little time I could think of others that paid. I think M. P. Jones, but I am not sure; I know in my own mind that he did, because he told me so a thousand times, and I know he went in on the same arrangement with the balance of us, and I

know that arrangements were made by this man Colby for the money to pay for his share. Now that he took it out of the bank and brought it here, I do not know.

Q—Do you know anything of the whereabouts of Mr. Colby?

A—Only from imagination.

Q—What is the fact?

A—He has been dead for, I think, ten or eleven years.

Q—How about Mr. Lunning?

A—Mr. Lunning died within the last year, or about a year ago.

Q—Mr. W. H. Parks?

A—Parks died in 1883 or later; three or four or five years ago.

Q—R. F. Parks?

A—He died since his brother; about 2 years ago.

Q—J. M. Peck?

A—J. M. Peck is dead; I was executor for his widow, and her estate is closed; he has been dead five or six years.

Q—Isaac Allen?

A—He has been dead twelve or fourteen years, I think.

Q—T. B. Simpson?

A—He has been dead about ten years, I think.

Q—Isaac Lohman?

A—He died about the same time—about ten years ago, I think.

Q—What was the fact about this $200,000 having been paid in good faith or otherwise for the purchase of this land?

A—It was paid in absolutely good faith, without any apprehension or feeling of fear on the ground of its title in any shape, manner or form.

Q—Or notice of any?

A—Or notice of any fraud or misrepresentation of any character or kind. We had perfect reliance on the title for which it was paid.

Q—At the time this land was conveyed to the California and Oregon Land Company what is the fact as to that company or its officers, agents, stockholders or others having any knowledge or reason to suspect that there was anything wrong with the title of any kind?

A—Not the slightest intimation, to my knowledge, and I was, as I say, President of the company, and, so far as that is concerned, the stockholders were the same owners.

Q—I want to know as to that question directly. Had the president, officers, stockholders, or anybody else to your knowledge, any knowledge or information whatever on that subject?

A—None whatever.

Q—What was the fact about the corporation having taken this in good faith and bona fide?

A—It did so in absolute good faith as to the purchase and the title.

Q—What sum of money, if any, has this company expended in the way of taxes since they purchased the land, if you know?

Objected to as immaterial.

Q—I will put the question in this way: State what sum of money this company has paid in taxes and any other expenses necessarily incident to maintain their land and the right to it?

Objected to as immaterial and incompetent.

A—In the purchase and in the maintenance, such as taxes and legal fees, employes of one kind and another, that is, agents, we have expended, etc., in business matters which naturally arise in such a matter, over $340,000, including the purchase price. That was 17 years ago.

Q—How much of that is taxes, if you know, paid to the State of Oregon?

Same objections.

A—Over $50,000.

Q—What sum, if any, has been received by the company from the proceeds of these lands as near as you can state?

A—You mean from all sources?

Q—Yes, what have been your receipts?

A—We have sold a little; we have received some rents, aggregating in the neighborhood of $20,000; not more than $20,000 or $23,000 at the outside; I would not say exactly, because I have to speak from memory.

Q—What knowledge have you, if any, and what is the fact as to whether any of this stock has been transferred to

persons other than those who were the original purchasers?

Objected to as incompetent and immaterial.

A—Well, there has not been very much; there has been some.

Q—Had such purchasers, to your knowledge, any knowledge or information as to any fraud or misrepresentations made to the Governor, the Secretary of the Interior, the Commissioner of the General Land Office or the President concerning those lands, certifying to them, listing them or patenting them?

Same objections.

A—Not to my knowledge. Of course I might say this: I don't want to be put in a false position here; there has been some little movement, as that within the last year or so, and they may have had notice; but to my knowledge they have no such notice. They may have had knowledge of this suit or something of that kind, but I do not know. To my knowledge they had no such notice.

Q—For what price has this stock been sold, if you know, upon the market?

Same objections.

A—Well, there has been some sold at $20 a share.

Q—Have you any knowledge or means of knowledge as to what the purchasers of this stock relied on as to this title when they made these purchases?

Same objections.

A—General knowledge, that is that they thought they were buying an interest in this tract of land and supposed the title was good. They paid that price and they had no knowledge to believe that the title was not good

Q—What was the capital stock of your corporation?

A—There are 20,000 shares, which is $2,000,000.

Q—Is there any other matter, Mr. Pond, that occurs to you that you care to mention that I have not called your attention to?

A—I think not.

CROSS-EXAMINATION.

Questions by Mr. Tanner:

When did you first come into the State of Oregon?

A—If you want me to be technical, I think I was in the State of Oregon as far back as 1855; but it was not in this part of it; it was in the southern portion of the State, the Goose Lake country.

Q—Had you been in the state at any time since that up to the time of this purchase?

A—No, sir, I think not. I would say, however, my knowledge of Goose Lake and that country led me to think better of this grant than I otherwise would.

Q—How long were you in the Goose Lake country?

A—Oh, only a few days. Crossed just below the line and stopped and traveled up into the country.

Q—You say that this abstract of title was present at the meeting at Sacramento?

A—I think it was; yes, sir, that is my recollection of it. I would not swear to that so positively, though, but my recollection is that it was there. The thing was thoroughly discussed, Mr. Belcher being present.

Q—Then the act of Congress making this grant and the act of the legislature and so on, was all before you at that meeting, was it?

A—I think it was discussed, yes.

Q—Was not Mr. Colby and Parks delegated by you to carry out that purchase?

A—They came up here for the simple purpose of making the transfer to see that there were no liens or incumbrances; at least, that was our instruction to them.

Q—You never had seen any of those lands, except in the vicinity of Goose Lake, had you?

A—No. sir. Well, I might say that when I was at Goose Lake I only had a general idea of this country; I do not know that I saw any of these lands, even then. Am not positive about that.

Q—Had any of your associates, that you know of, in this purchase, ever seen any of these lands at the time of that purchase?

A—Not that I am aware of.

Q—Was not Mr. Colby acting in this matter when he came up to Oregon as agent for the rest of you gentlemen?

A—Not as an agent, any further than to do just what I have said.

Q—How much of this $200,000, if you know, reached the Oregon Central Military Road Company?

A—Well, if you ask me for my personal absolute knowledge, I don't know. I supposed at the time that $200,000 reached them.

Q—You don't know whether it did or not?

A—I didn't see it paid.

Q—How much brokerage did you pay?

A—We paid no brokerage.

Q—Don't you know, as a matter of fact, Mr. Pond, that only about $125,000 of this money ever reached the company?

Objected to as immaterial.

A—Shall I answer from hearsay or from the books of the company?

Q—(Mr. MALLORY)—From your own knowledge?

A—Well, suppose I have seen the books, and they show one entry. I don't know whether there were other entries.

Q—(Mr. MALLORY)—You do not know then, of your own knowledge? You can answer from your own knowledge, and that is the only thing you have a right to speak from; just state what you know?

A—I know we furnished $200,000 and sent it here to pay for these lands; we got the deed, and the consideration in the deed was $200,000, and we supposed it was all paid. Three or four years since——

Q—(Mr. MALLORY). It does not matter to these purchases whether the money ever got to that company or not.

A—The company may have paid it out; I don't know who got it.

Q—Well, state what you were going on to state when interrupted.

A—Well, I have learned that the company paid out to other parties a part of this money, or somebody did; I don't know whether it was brokerage or what it was.

Q—Did you not testify as a witness before the commissioner that was sent out here to investigate the question as to whether these roads were seasonably and properly constructed or not?

A—Yes, I did.

Q—I will ask you if you did not testify before that commission in answer to the cross-interrogatories propounded to you by J. B. McNamee, one of the commissioners, as follows: "What was the amount of brokerage in this payment (referring to this $100,000 payment)? A—We paid no brokerage. In my reference to brokerage in my examination in chief, I had in mind the fact that about a year ago I discovered by examination of the books of the road company that they had received for the first half of the land purchase but $50,000, while the purchasers had made $100,000, the other $50,000 having been appropriated by some one to another purpose without the knowledge of the purchasers, they supposing that the $100,000 without any charge for brokerage or otherwise was the price to be paid to the road company for the land. In the matter of this purchase Messrs. W. H. Parks and G. W. Colby, above named, were our agents. In the purchase of the second undivided half a similar course seems to have been followed, the purchasers paying $100,000, the road company, according to their books, receiving $75,000."

A—Certainly, that is correct absolutely, except so far as it says they were our agents. I mean to say they were only our agents to that one extent; that as I said before I got from their books; I do not know what became of it; they may have paid all that brokerage so far as I know.

Q—What you testified to there was correct, then, was it?

A—It was correct so far as what I say there, only you must understand how I got it from the books; and furthermore, it is correct except so far as Mr. Colby was only agent—I want that qualified—only agent to that extent—to come here and see that there were no liens or anything of the kind; call it agent or what you like.

Q—You testified before this commission as I have read to you, didn't you?

A—Exactly, and I affirm it now absolutely, word for word,

except qualifying that word agent, saying that he was only agent to that extent.

Q—But I am asking you if you did not testify before this commission as it is stated there to you?

A—Yes, sir, I did.

Q—You say you do not know of your own knowledge whether any of these other purchasers composing this syndicate, except yourself and Mr. Lunning, paid their $10,000?

A—I only know this with regard to that. I say I absolutely know Mr. Lunning furnished a certificate of deposit, and so did I; and I think ours were put together; that is my recollection now. Further than that, I know it was said that the money was all in. I say of my own knowledge I do not remember now that I saw the actual certificates except in that instance; but I know the parties, and I know that they told me they paid it, and I know that they are straight, clean business men, too.

Q—You have not been paying any taxes on the unpatented portion of these lands, have you?

A—Well, you would have to let me examine that matter to be sure. I am of the opinion that we have been taxed on lands in Klamath county that have not been listed or patented. That is my impression at the moment.

Q—As a rule you have not been paying on those unpatented lands?

A—No, sir; not as a rule. We have paid on our listed or patented lands. The listing, previous to the act of June, 1874, was treated as a patent in this State, if it was that class of lands. Hence, I will modify my answer where I say "listed, or patented," by saying listed and patented lands.

Q—Of course, you have not been paying taxes on the unsurveyed portions, or those portions that have not been listed or patented to the company?

A—We have not been paying on the unsurveyed portions. Wait; I am not so sure about that, either. I think in Klamath County we have been so paying.

Q—How could they assess it to you?

A—I think we have been assessed for lands, even unsurveyed, although I would not swear to that positively.

Q—Have you anywhere a list of the lands upon which you have been paying taxes?

A—They are lying in these different counties, there; they are assessed to us, and at first they would assess them in one big chunk, like cutting off a candle, regardless of sections or anything else, and finally they undertook to cinch us, and then we made them assess them according to law, which they did in the last two years, and thereafter we have been assessed, I think, and have paid assessments on lands that were not listed; but we have a case in Klamath county now of a similar character. And I think we are paying taxes there on lands that have not been listed, but I am not positive enough of that to swear to it. However, I will say that we have paid over $50,000 in taxes.

Q—Do you say you have a suit pending in Klamath County?

A—It is not a suit as yet. It is a disagreement.

Q—Do you know what has become of this Mr. Walker spoken of?

A—No, sir, I do not. Mr. Walker was mixed up in various operations, one kind and another, in this country and that, and for two or three years I kept the run of him more or less, and the last I heard of him, I think, was in Washington City, in rather an impecunious condition.

Q—Was he a citizen of Oregon or California?

A—He was a bird of passage, I think, so far as I know. I don't know whether he did live. At least I do not know where his home was. He seemed to be abroad—sometimes here and sometimes there.

Q—You made no inquiry, any of you, did you, before this purchase into the fact as to whether this road had actually been built or not?

A—No, no more than we had the certificate of the Governor before us.

Q—You did not know, as a matter of fact, whether it had been built or not, did you, except from the certificate?

A—The certificate of the Governor. The question was not raised and no suspicion in regard to it.

Q—You did not send any one up here before this purchase to inquire into that question?

A—No, sir.

Q—Or to look at these lands?

A—No, sir.

Q—How were those twenty thousand shares of capital stock of this company divided up among you?

A—Well, suppose I owned a tenth. I got a thousand shares of stock—2,000 I would say. A tenth of each half. We bought it in tenths first.

Q—How much stock would that give you, par value, for the ten thousand dollars you put into the pool?

Objected to as immaterial and not proper cross-examination.

A—It would be considerable if it was at par; at that rate, if you were to take the par value of the stock, according to that corporation, the property would be worth $2,000,000.

Q—And your stock would represent how much?

Same objection.

A—It would be $100,000; one-twentieth of it would be.

Q—This company that was organized, the California and Oregon Land Company, did not, as a matter of fact, pay anything for this land, did it? It was just put into the name of that company as a matter of convenience?

A—The company simply represents the original parties to the purchase. They incorporated and put it into the name of the corporation simply for convenience to allow them to handle the property and take care of it and protect it, etc.

Q—You do not know of your own personal knowledge, do you, whether those few people you mentioned as having bought stock in this company, bought it without any notice or knowledge of this alleged fraud or not?

A—Of course, I do not know what they may have known; but I do not think they would have paid $200,000 for the property without they had an idea it was pretty good.

Excused.

The same agreement was made with respect to the signature of this witness as is noted at the close of the last one.

E. B. POND.

By GEO. H. DURHAM, Ex.

Whereupon further proceedings herein were now adjourned until

GEO. H. DURHAM, Examiner.

PORTLAND, Oregon, August 17th, 1891—1:30 P.M.

Parties met by consent. Rufus Mallory, attorney for defendants, and A. H. Tanner, of counsel of the United States; whereupon the following proceedings were had to wit:

GEO. H. DURHAM, Examiner.

William S. Ladd, called as a witness for the defendants and duly sworn, testified as follows:

DIRECT-EXAMINATION.

Questions by Mr. Mallory:

Q—State your name, age, residence and occupation?

A—W. S. Ladd, residence Portland, Oregon, occupation banker; I am not quite 65 years old—64 past.

Q—State what relation you sustained at any time to the defendant, Oregon Central Military Road Company, or what official position you ever held in it?

A—I was a stockholder and director.

Q—Were you an officer of that company at the time it sold its lands to certain parties in California in 1874, and if so what office did you then hold?

A—President of the company.

Q—Was the sale of said lands made on credit or for cash?

A—It was made as a cash sale.

Q—Did or did not the purchasers pay the money or its equivalent for the land purchased by them?

A—Yes, sir; they paid the cash.

Q—Does or does not any sum remain unpaid for the purchase of said land by the Oregon Central Military Road Company or has full payment thereof been paid?

A—The purchase price has been fully paid.

Q—At the time the sale of this land was made and the deeds thereof delivered, or prior thereto, had the said Oregon Central Military Road Company, or any of its officers, stockholders, agents, or persons in its employ, or acting in its interest, any knowledge, notice or information, or ground

to suspect or believe that any fraud had been practiced, or any misrepresentations made by any persons whomsoever to induce the Governor of Oregon to falsely issue the certificates mentioned in the bill of complaint, certifying that the Oregon Military Road Company, mentioned in said bill of complaint, had been duly and seasonably constructed, or to falsely induce the Secretary of the Interior or Commissioner of the General Land Office to list said land to the said company as having been duly earned by the construction of said road, or to induce the President of the United States to falsely issue patents for these lands so earned?

Counsel for compainant objects, on the ground that it is incompetent and immaterial.

A—No; I never heard of any such thing.

CROSS-EXAMINATION.

Questions by Mr. Tanner:

Q—Who negotiated the sale of the lands, Mr. Ladd?

A—There was two gentlemen came here: one by the name of Colby.

Q—G. W. Colby?

Counsel for defendants object, on the ground that it is not proper cross-examination.

A—Yes, sir.

Q—Do you know who the other party was?

A—I do not now recollect. There was a man by the name of Parks, but whether he was here with Colby I now fail to recollect. There were two gentlemen came here to make negotiations.

Q—Who negotiated the sale on the part of the company?

A—Mr. Pengra. The talking was done with Mr. Pengra, and then the directors or stockholders held a meeting, and the proposition was submitted to them and then action was taken upon it. That is my recollection.

Q—And who was this purchase price paid to, and by whom was it paid?

A—It was paid by Mr. G. W. Colby and the gentleman who was with him. Mr. Colby done the business. I had the drafts paid to Ladd & Tilton on account of the Oregon

Central Military Road Company. J. N. Dolph, as treasurer, received the respective credits.

Q—How much did the company receive?

A—They received $125,000.00, May 26th, 1874. That was paid through the Bank of California. May 31st the Bank of California telegraphed to Ladd & Tilton to pay G. W. Colby $50,000.00, but that payment was not consummated until May 26th. October 13th, 1874, the final payment was made of $75,000.00.

Q—Was you president of the company at the time this land was sold?

A—I was, to the best of my recollection.

Q—The land was sold by the company to these purchasers?

A—These purchasers represented that they were buying this property for some California people, but who composed that party I do not know.

Q—You understood that they were representing some parties besides themselves, did you?

A—Yes, sir.

Q—Do you know how long Mr. Colby was up here at that time?

Counsel for complainant objects on the ground that it is not proper cross-examination.

A—No, I do not.

Q—Had you ever seen him before this last payment?

A—I was not here on October 13th. It is my recollection that Mr. Colby came here first with another party and opened negotiations towards the purchase of this property, and after he got the terms he went back to California and made his arrangement to make the payments; that is my recollection. I want to state in the way of explanation that this was started while I was sick. I was unable to be at the office every day, and I could not recall these transactions until I took Ladd & Tilton's books and went through them and found the account, found just how the payments were made.

Q—How was the money deposited, to the credit of Mr. Dolph as treasurer?

A—Yes, sir. On the 26th of May I received credit of

$60,000.00 paid through telegram. $75,000.00 was paid in the way of drafts on a letter of credit on drafts that Colby drew on parties in California. There was $30,000.00 drawn on account of credit with a banker in California. That is to say, the banker had the credit to pay $30,000.00, and the balance, $45,000.00, was Colby's drafts on the Bank of California and Rideout & Smith, bankers of Marysville. So we got out $75,000.00.

RE-DIRECT EXAMINATION.

Q—Did you know anything of negotiations having been carried on between these purchasers and a man by the name of Walker in California?

A—I do not recollect the name of Walker.

Q—In whose hands had the land been placed by your company, if anybody, to sell?

A—Mr. Pengra was the manager of the company in building the roads and everthing. He was anthorized to find purchasers. The records will show that he was authorized to make sale of the lands. He was the general agent of the company and the superintendent of the construction of all the roads.

Excused.

W. S. LADD.
By GEO. H. DURHAM, Ex.

Attest: GEO. H. DURHAM, Examiner.

PORTLAND, September 13, 1891. 2 P. M.

The parties met at my office by consent, present by their counsel, whereupon the following proceedings were had, to wit:

Joseph N. Dolph being first duly sworn, testified on behalf of the defendants as follows:

DIRECT EXAMINATION.

Questions by Mr. Mallory:

1—State, if you please, your name, age, residence and occupation?

A—Joseph N. Dolph; I will be 56 years of age on the 19th of October next; my only occupation at present is as a Senator of the United States; by profession I am a lawyer.

2 Q—Did you know at any time of the existence of a corporation known as the Oregon Central Military Road Company?

A—I did.

3 Q—Were you at any time an officer of that company, or if not an officer, did you ever have any business relations of any kind with it?

A—I was for a time, and I think during the last years of its active existence, the treasurer of the company. I acted as attorney for the company for several years before it sold its land grant. I have an impression that during the whole or a portion of the time I was connected with the company I was a director, but it is only an impression. My recollection does not serve me on this point—probably because I have been connected with so many companies since. I would not be positive whether I acted as director of the company or not.

4 Q—Were you its treasurer at the time it made sale of its lands?

A—I think I was.

5 Q—How was that sale made?—for cash or upon credit?

A—I am unable to state. I think a considerable portion of the purchase price was paid down, and have an impression that a credit was given for a short time for a portion of it.

6 Q—What is the fact, if you know, about the remainder of the purchase money having been paid, if a credit was given?

A—The purchase price agreed upon was paid, and without any considerable delay.

7 Q—Did there or not any balance then remain unpaid?

A—The whole purchase price was paid and distributed among the stockholders, and the affairs of the company wound up within a very brief period after the sale was made.

8 Q—At the time of the sale of this land did you as one of the officers of the company, or did the company itself or any of the officers, stockholders or agents representing the company, to your knowledge, have any knowledge or notice,

information or ground to suspect or believe that any fraud had been practiced, or that any representations had been made by any person, to induce the governors or either of them to make false certificate concerning the construction of the road?

Objected to as incompetent and immaterial.

A—I had no knowledge or information nor ground to suspect that any misrepresentation had been made by any person to induce the Governor of Oregon to falsely issue the certificates mentioned. I had no reason to suspect, and no knowledge or belief, that the certificates had been falsely issued or were false in any respect. And I had no knowledge or belief, or reason to know or believe, that any other officer or agent of the company had any reason to believe that there had been any fraud practiced or any misrepresentation made by any person to induce the Governor of Oregon to falsely issue the certificates, or in regard to any matter connected with the company or its property.

9 Q—Had you any knowledge or information of any fraudulent representation having been made to the Secretary of the Interior or Commissioner of the General Land Office to induce those officers, or either of them, to make false lists of lands as having been earned to this company, or to induce the President of the United States to falsely issue patents for lands so claimed to have been earned?

Same objections by complainant.

A—I had not.

10 Q—What knowledge have you, if anything, upon the question of this purchase having been made by the purchasers bona fide and for value?

Same objections.

A—I think the sale was negotiated mainly by Mr. Pengra. My present impression is, although the deed will show for itself, that the conveyance was made to Mr. Pengra. As attorneys for the company the firm of Mitchell & Dolph were requested to prepare an opinion as to the title of the land grant. This we did, construing the provisions of the grant, and proceeding upon the assumption that the lands had been earned by the construction of the road, and that that fact was evidenced by the certificates of the Gover-

nor as required by the terms of the grant. I understood that our certificate of title was for the satisfaction of the purchasers of the grant, with whom I was not at the time in communication, I think. I examined the question, and prepared the opinion, and in the usual course of business signed the name of the firm to it. I never had any reason to suppose but what the purchase was made in good faith, and have every reason to suppose that the parties believed they were acquiring good title to the lands.

CROSS-EXAMINATION OF JOS. N. DOLPH.

Questions by Mr. Tanner:

11 Q—Are you able, Mr. Dolph, to state the particulars as to the time when this purchase money was paid, and by whom it was paid?

A—I am not able to recall dates at all in connection with this business. It was a great many years ago, and since then I have had so many larger transactions on hand that, until my recollection was refreshed to-day, I had forgotten that I was treasurer of the company. The money was paid about the time that the deed was made. My impression is—I hesitate to give it, because the books and records of the company will show for themselves—my impression is that $50,000 was paid down on delivery of the deed, and that there was a credit for a short time of $75,000, which was paid through Mr. Ladd, or through the bank of Ladd & Tilton. The amount received by the company, according to my present recollection, was $125,000. It was an amount that just about covered the original outlay of the company upon the road, without interest. I know the stockholders, of which I was one, made nothing out of the investment, and had it not been for the small compensation which I received as attorney and treasurer of the company, I should have lost by my investment in it.

12 Q—Did you become acquainted with Mr. Colby, who was up here representing the California purchasers?

A—Yes; I met Mr. Colby several times.

13 Q—You say that the certificate of title that was given by the firm of Mitchell & Dolph was made at the request of the company, and not at the request of the purchasers?

A—The request came probably from the president of the company, or Mr. Pengra. The compensation I received was from the company, I think there had been no arrangement about my compensation; I received such compensation as the directors chose to allow me for my services; and the preparing of this certificate was done for the company, as other services performed for it.

14 Q—In that opinion or certificate, of course, you assumed, as a matter of fact, that the road provided for in the act of Congress had been, as a matter of fact, constructed, did you not?

A—Certainly. The opinion has been since printed in Congressional documents, and undoubtedly you have a copy of it. I was not employed to investigate the question as to whether the road had been completed. I know no reason why such a question should be raised. I knew from reports of agents and employees of the company, and from other information, that the road had been constructed; and I knew also that the Governor's certificate had been issued to that effect; and therefore I assumed that such was the fact, that the road had been completed and the grant earned.

15 Q—You had not been over the road yourself, had you, at that time?

A—No; I never have been over the road. I however had heard much about the road before I ever became interested in it. I remember the day that Governor Gibbs returned to his office in this city after he had personally inspected the first fifty miles of the road, of having a conversation with him in his office (which was just adjoining mine), in which he said that that portion of the road was the best mountain road he had ever seen.

Counsel for complainant moves to strike out all of the last foregoing answer relative to what was said about this matter by other parties to the witness.

16 Q—You were a member, I believe, of the 50th Congress?

A—I was.

17 Q—And submitted a report, did you not, as chairman of the Committee on Public Lands recommending the passage of the bill under which this suit was brought?

A—I did; it may be assumed that that bill is my measure.

18 Q—You say Mr. Pengra negotiated the sale of the lands for the company?

A—I think he was the man that had the most to do with it.

RE-DIRECT EXAMINATION.

19 Q—You do not know, I suppose, what agents he may have employed to assist him in making the sale?

A—No, I do not; except I think that Mr. Colby was connected with him, and that the two in some manner were the parties who intervened between the company and the real parties in interest—the people who furnished the money.

20 Q—Do you know anything about a man by the name of Walker having anything to do with it?

A—No, I do not remember who the parties were.

Excused.

(Signed) J. N. DOLPH.

Attest: GEO. H. DURHAM, Examiner.

Whereupon further proceedings herein were now adjourned without date.

GEO. H. DURHAM, Examiner.

THE UNITED STATES, Complainant,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, Defendant. } No. 1632

DISTRICT OF OREGON, ss.

MONDAY, OCTOBER 26, 1891.

The parties to the above-entitled suit appearing before me at my office, the United States being represented by A. H. Tanner, Esq., its solicitor, and the defendant by Rufus Mallory, Esq., of its solicitors, whereupon the following proceedings were had, to wit:

Counsel for the complainant now offers to call witnesses to show that the wagon road known as the Oregon Central Wagon Road, and referred to in the bill in this suit, was

never built as required by the Act of Congress, and that the certificates of the Governors that it was built and constructed were obtained by misrepresentation, as charged in the bill.

Counsel for the defendant, the California and Oregon Land Company, objects to the introduction of this testimony as immaterial and irrelevant, for the purpose of controverting the matters contained in the plea or the testimony introduced in pursuance thereof.

EXAMINER.—Let the record show that George Joseph, heretofore sworn as a witness in behalf of the complainant in this case, was thereupon called to the stand and interrogated by complainant's counsel as follows:

Q—State fully and at length all you know as to whether or not the wagon road known as the Oregon Central Military Wagon Road referred to in the bill in this suit was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way the certificates of the governors of Oregon, that said road or portions thereof had been built, were obtained.

Counsel for the defendant objects to the question as irrelevant and immaterial to the issue made by the plea in this case, and as immaterial for the purpose of answering any evidence taken in support of the plea, and for the further reason that the plea raises no issue upon the question of the construction of the road; and before an answer shall be made to the question, counsel for the defendant, the California and Oregon Land Company, requests the examiner to certify the question to the court for his opinion as to whether the question should be answered.

EXAMINER'S NOTE.

Before taking the answer, I will certify this question to the court as requested by counsel for the defendant, for the purpose of taking the opinion of the court as to the relevancy and materiality of the testimony, sought by the question referred to.

GEO. H. DURHAM, Examiner.

The above question having been submitted to the court and the objections of defendants' counsel by it sustained, the counsel for complainant then stated that in view of the ruling of the court he had no further testimony to offer and therefore rested his case.

GEO. H. DURHAM, Examiner.

DISTRICT OF OREGON, ss.

I, G. H. Durham, Examiner, do hereby certify that the testimony of the witnesses named in the foregoing record was taken before me at the time, places and in the manner therein recited and shown; that before testifying, each of said witnesses was by me duly and severally sworn to tell the truth, the whole truth and nothing but the truth; that the testimony of each of said witnesses was taken before me and under my direction, in shorthand by a stenographer therefor duly sworn by me, and the shorthand notes were either signed by the witnesses or the witnesses' names were appended to the extended record by me, by stipulation of the parties.

GEO. H. DURHAM, Examiner.

Endorsed: Filed Nov. 23, 1891.

R. H. LAMSON, Clerk.

PORTLAND, Oregon, January 13th, 1872.

Messrs. Mitchell & Dolph:

GENTLEMEN: The following statement of the chain of title of the Oregon Central Military Road Company to certain lands, is submitted for your examination and opinion as to the validity and present condition of such title.

First. The Oregon Central Military Road Company is a corporation duly incorporated April 14th, 1864, under the general incorporation laws of the State of Oregon, (a copy of which, with the amendments, is hereto attached marked Exhibit "A") for the purpose of constructing a wagon road from Eugene City to the eastern boundary of the State of Oregon.

Second. An act of Congress of the United States, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the southern or eastern boundary of the State." Approved

July 2d, 1864. (See Statutes at Large of the United States, page , a copy of which act is hereto attached marked "B")

Third. An act of the Congress of the United States entitled "An act to amend an act entitled an act granting lands in the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of the State." Approved December 26th, 1866, (a copy of which is hereto attached marked "C." See 14th Statutes at Large of the United States, page 374.)

Fourth. An act of the Legislative Assembly of the State of Oregon, entitled "An act donating certain lands to the Oregon Central Military Road Company," a copy of which is hereto attached marked "D," and which is found published in the journal of the Senate proceedings of the session of 1864.

Fifth. An act of Congress, entitled "An act to amend an act entitled an act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of the State," approved March 3d, 1869, a copy of which is hereto attached marked "E," and which is found in 15th United States statutes at large, page 338.

Sixth. The entire road of the company was completed in all respects according to the said several acts of Congress and the laws of the State of Oregon, and duly approved by the Governor of the State of Oregon, as appears by the original letter of Hon. Joseph S. Wilson, Commissioner of the General Land Office, to Hon. H. W. Corbett, United States Senator from Oregon, dated March 2d, 1870, hereto attached marked "F."

[SEAL.] W. S. LADD,
Prest. O. C. M. R. Co.

UNITED STATES OF AMERICA, }
State of Oregon. } ss.

We, the undersigned attorneys and counselors at law, residing at the city of Portland, in the county of Multnomah, in the State of Oregon, in the United States of America, do hereby certify that we have examined the acts of Congress

and the act of the legislative assembly of the State of Oregon, made part of the foregoing abstract of title, and that said several acts were duly passed and published as therein stated, and that said copies are true and correct copies of the said several acts as the same are published by authority.

MITCHELL & DOLPH,
Attorneys and Counselors at law.

EXHIBIT "A."

PRIVATE INCORPORATIONS.

An Act Providing for Private Incorporations and the Appropriation of Private Property Therefor.

Be it enacted by the legislative assembly of the State of Oregon, as follows:

Section 1. Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit or occupation, they may do so in the manner provided in this act.

Sec. 2. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgement of a deed; and file one of such articles in the office of the Secretary of State, another with the clerk of the county where the enterprise, business pursuit or occupation, is proposed to be carried on, or the principal office or place of business is proposed to be located, and retain the third in possession of the corporation.

Sec. 3. The articles of incorporation, or a certified copy of the one filed with the Secretary of State, or the County Clerk, is evidence of the existence of such corporation.

Sec. 4. The articles of incorporation shall specify:

1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation, if limited.

2. The enterprise, business, pursuit or occupation, in which the corporation proposes to engage.

3. The place where the corporation proposes to have its principal office or place of business.

4. The amount of the capital stock of the corporation.

5. The amount of each share of such capital stock.

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road, canal, or site of such bridge.

Sec. 5. Upon the making and filing of the articles of incorporation, as herein provided, the persons subscribing the same are corporators; and authorized to carry into effect the object specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns, by the name assumed in such articles, shall thereafter be deemed a body corporate with power:

1. To sue and be sued.

2. To contract and be contracted with.

3. To have and use a corporate seal, and the same to alter at pleasure.

4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient, to carry into effect the object of the incorporation.

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation.

6. To make by-laws, not inconsistent with any existing law, for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; provided, that no such sale shall be made without thirty days' notice of the time and place of sale, in some newspaper in circulation in the neighborhood of such company; for the transfer of its stock, the management of its property, and for the general regulation of its affairs.

Sec. 6. The corporators, or any portion of them, designated by a majority of the whole number, are authorized to open books and receive subscriptions to the capital stock of the corporation, and as soon as such capital stock has been

subscribed they shall give notice to the subscribers to meet at such time and place as they may designate, for the purpose of electing not less than three nor more than seven directors, as the stockholders present shall determine; provided, that it shall be lawful in the organization of any corporation proposing to construct more than ten miles of railroad to elect a board of directors as soon as one-half of the capital stock has been subscribed.

Sec. 7. The corporators present at such meeting shall be inspectors of the election, and certify who are elected directors, and appoint the time and place for their first meeting; and each stockholder who shall attend in person or by proxy, appointed by writing, and subscribed by such stockholder, shall be entitled to one vote for each share of capital stock subscribed by him; but after such first election of the directors, no person shall vote on any share upon which any installment, or portion thereof, is then due and unpaid.

Sec. 8. No person is eligible to the office of director unless he is a stockholder in the corporation and resident of the State, and a director ceasing to be such stockholder or resident ceases to be a director; provided, that coporations constructing railroads in this State may permit a minority of the board of directors to reside out of this State. Before entering upon the discharge of their duties, the directors shall each take and subscribe an oath to faithfully and honestly discharge such duties.

Sec. 9. The directors, when elected and qualified at the first meeting thereafter, shall elect one of their number president, who shall preside at their meetings, and perform such other special duties as the directors may authorize, and at the same time shall appoint a secretary, whose duty it shall be to keep a fair and correct record of all the official business of the corporation. From the first meeting of the directors the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise specially provided in this act.

Sec. 10. The notice of the time and place of the first meeting of the stockholders, for the election of directors,

shall be given by publication of the same for thirty days before such meeting in some newspaper, published at least once a week, in the county where the meeting is to be held, or in some newspaper published in like manner, and in general circulation therein; provided, that nothing herein contained shall be construed to prevent such stockholders from holding such meeting for the election of directors before the expiration of thirty days after such stock is subscribed, and without the publication of the notice above referred to; provided, further, that all such stockholders shall be present at such meeting, or consent thereto in writing, which consent shall be filed with the secretary of such company. All notices of subsequent meetings of stockholders or directors shall be given for such time and in such manner as the directors may prescribe.

Sec. 11. There shall be an annual election of directors, and at each election after the first, the president of the corporation shall act as inspector of election, and certify who are elected directors. The directors chosen shall hold their offices for one year thereafter, and until their successors are elected and qualified. The powers vested in the directors may be exercised by a majority of them.

Sec. 12. Every corporation organized under this act shall keep a stock-book in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof, which stock-book, or a certified copy thereof, as to the items in this section specified, shall be subject to the inspection, at all reasonable hours, of any person interested therein and applying therefor.

Sec. 13. The stocks in all private corporations organized under this act, are to be deemed personal property, and subject to attachment, execution, levy and sale, as such; and the corporation, in case of such sale, is required to make the necessary transfer to the purchaser, upon the stock-book.

Sec. 14. All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder, or person from whom the same is purchased, and

subject such purchaser to the payment of unpaid balance, due, or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser.

Sec. 15. If the directors of a corporation declare and pay dividends, when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation then existing, or incurred while they remain in office; or if such directors shall, by any official act or conduct, fraudulently induce any person to give credit to such corporation, they shall be liable in like manner to such person for any loss he may sustain thereby; but any director who voted against such dividend, or such fraudulent act or conduct, if present, or who thereafter, as soon as the same came to his knowledge, filed his objection thereto, shall be exempt from such liability

Sec. 16. Any corporation organized under this act, which does not elect directors and commence the transaction of the business for which it was formed within one year from the time of the filing of the articles of incorporation, shall thenceforth be divested of its corporate powers, and if such corporation shall for any period of six months after the commencement of its business neglect and cease to carry on the same, its corporate powers shall also cease.

Sec. 17. All corporations that expire by the limitation specified in their articles of incorporation, or are annulled for forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for the period of five years thereafter, if necessary, for the purpose of prosecuting or defending actions, suits or proceedings, by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business.

Sec. 18. The stockholders of any private incorporations heretofore incorporated by any special act of the legislature, may at any time hereafter, while such corporation exists, incorporate themselves under this act in the mode herein pre-

scribed, for the purpose of carrying on the enterprise, business, pursuit or occupation, for which they may have been specially incorporated; and the filing of the articles of incorporation shall be deemed a surrender of such special incorporation, but not of any vested rights thereunder, and thereafter such corporation shall have the powers and privileges, and be subject to the liabilities and limitations provided by this act, and not otherwise.

Sec. 19. Any corporation organized under the provisions of this act, may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of and the settling of its business, and disposing of its property, and dividing its capital stock; provided, however, that the capital stock of any corporation formed under this act, except corporations formed for the purpose of making and constructing a railroad, shall never exceed the sum of two millions of dollars, and any corporation that shall violate this provision of this act shall forfeit its corporate rights.

Sec. 20. Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railroad, macadamized road, plank road, or clay road, or canal, or bridge, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of navigation, occasioned by any rapids or other obstructions to the navigation of such stream or other water in like manner or with like effect, as if such corporation had been specially formed for such purposes, but no corporation formed under this act, or heretofore or hereafter incorporated by any special act of incorporation, passed by the legislative assembly of this State, or otherwise, for the purpose of navigating any stream or other water of this State, or forming the boundary thereof in whole or in part, nor any stockholder in such corporation shall ever take or hold stock, or any interest directly or indirectly in the stock of any corporation which may be formed under this

act, for the purpose of building or constructing any road in this act mentioned; nor shall any such corporation ever purchase, lease or in any way control such road or the corporate rights of such last named corporation; provided, further, that corporations heretofore incorporated or which may hereafter be formed under this act, for the purpose of establishing and keeping a ferry across any stream or other water of this State or forming the boundary thereof, in whole or in part, shall not be deemed a corporation for the purpose of navigating such stream of water, within the meaning of this act, nor shall the stockholders thereof be restrained from taking or holding stock in a corporation formed under this act for the purpose of constructing or building any road.

Sec. 21. The stockholders may, by a majority vote of the stock, change its general place of business.

Sec. 22. The directors of any corporation may file supplementary articles of incorporation at any time, when a unanimous vote of all the stock subscribed shall so determine, for the purpose of engaging in any new enterprise or business pursuit, not in violation of law, or for the purpose of changing any part of their road or canal or either terminus or both; the directors shall cause a notice to be published of the filing of such supplementary articles setting forth the object of the same.

CORPORATIONS.

When authorized to appropriate land for corporate purposes.

Sec. 23. A corporation organized for the construction of any railroad, macadamized road, plank road, clay road, canal or bridge, shall have a right to enter upon any land between the termini thereof, for the purpose of examining, locating and surveying the line of such road or canal or the site of such bridge, doing no unnecessary damage thereby.

Sec. 24. Such corporation may appropriate so much of said land as may be necessary for the line of such road or canal, or the site of such bridge, not exceeding sixty feet in width, besides a sufficient quantity thereof for toll

houses, work-shops, materials for construction, timber excepted, a right of way over adjacent lands to enable such corporation to construct and repair its road, canal or bridge, and to make proper drains; and in the case of a railroad to appropriate sufficient quantity of such lands, in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct. But no such appropriation of private property shall be made until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner hereinafter provided.

Sec. 25. Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation, for the purpose of avoiding annoyances to public travel or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change, shall have the same right to enter upon, examine, survey and appropriate the necessary lands and materials, as in the original location and construction of such road or canal.

Sec. 26. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road upon the extent, terms and conditions upon which the same may be appropriated or used and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of said road.

Sec. 27. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall

locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof, shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation with reference thereto.

Sec. 28. Whenever such public highway or grounds is taken by a private corporation by agreement with the local authorities mentioned in section 26, such corporation may place such gates thereon, and charge and receive such tolls thereat as such local authorities may consent to by such agreement, and none other; but when the same is appropriated without such agreement, as provided in section 27, such corporation shall not place any gate or other obstruction upon the public highway or grounds appropriated, nor charge or receive any toll from any person passing over or along the same.

Sec. 29. Any road, other than a railroad, constructed by a corporation formed under this act, shall be cleared of standing timber for thirty feet in width of said road, and shall have a track in the center not less than sixteen feet wide, finished and kept in good traveling condition, except when the cutting on said road is six feet or more deep on either side, in which case such track may not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of such narrow track.

Sec. 30. All streams or other waters upon the line of such road shall be safely and securely bridged, except where the county court of the county wherein the line of such road may cross such streams, or other water, or if such stream or other water form the boundary between the two counties, then the county court of either of said counties, may authorize the corporation to place a ferry-boat upon such stream or other water, to be kept and run for such toll as the county court may prescribe, and in the manner required of ferries established under the general statutes in relation to ferries; or except where such county court may authorize such corporation to connect their road with a ferry, now or

hereafter established over such stream or other water, under the general statute in relation to ferries.

Sec. 31. Whenever a road of any kind herein mentioned, other than a railroad, is completed, or any particular section of it fit for public travel, the corporation shall give notice thereof, by publication in some newspaper of general circulation along the line of such road or section, or by posting notices along the line of such road or section, or by posting notices along such line in some conspicuous places, not less than five miles apart, and thereafter such road or section thereof is a common highway, so that every person, with his stock and vehicles of every description may travel thereon upon the payment of the tolls prescribed by the corporation, subject to the power of the corporation, by giving notice thereof in like manner, to suspend such right of travel upon all or any portion of such road, for a reasonable time, to enable it to make any necessary repairs or improvements thereon.

Sec. 32. A corporation shall only collect and receive toll on its road at a gate established thereon, and such shall be plainly and specifically printed or written upon a signboard, posted at such gate, in plain view of the traveler on the road; but such corporation shall not establish any gate within the limits of any town, whether incorporated or not, or within one-half mile of the limits of such town, except as specially provided in section 28; but no person traveling on foot, or going in any manner, or with any property, from one part of his farm to another part, or going to or from church, funerals or elections, is liable to pay for traveling upon such roads.

Sec. 33. Any person traveling upon any road herein mentioned, who shall pass through a gate thereon, without paying a toll legally chargeable thereat, or who shall go around such gate, with intent to avoid the payment of such toll, shall be liable to the corporation for three times the amount thereof, and any corporation which, by its agents and servants, or in any manner shall illegally collect any toll from any person traveling on such road shall be liable to such person for three times the amount thereof.

Sec. 34. Any bridge constructed by a corporation formed under this act, when completed and fit for travel, and notice thereof is posted in some conspicuous place on such bridge, or by publication in a newspaper, as the case of a road, is a common highway, within the meaning and subject to the conditions specified in section 31, as to roads, and subject to the further power of the corporation to prescribe by advertisement in some conspicuous place on the bridge, the rate of speed any one may travel on such bridge.

Sec. 35. A corporation may collect and receive such tolls for crossing its bridge, as may be plainly written or printed upon a signboard, posted in some conspicuous place on such bridge, but no person not liable to pay toll on a road as provided in section 32, is liable to pay toll for crossing such bridge; and any person who shall pass over such bridge without paying the toll legally chargeable thereat, or any corporation which shall illegally collect any toll from any person crossing such bridge, shall be respectively liable to each other for three times the amount of such toll, as provided in section 33, in case of roads.

Sec. 36. Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe.

Sec. 37. It shall be the duty of every incorporation organized for the construction of any macadamized road, plank road, clay road, or bridge, to keep an accurate statement or account of the moneys expended by such corporation, in the construction of any such road or bridge, and keeping the same in repair, including any sums paid for lands, appropriated as necessary for said corporation, which statement or account shall be verified at the time of the annual meeting held for the election of directors, by the president of the said corporation, or one of the directors thereof, to the effect that he believes the said account to be just and correct, and a copy of such verified account shall, within ten days after such annual election, be deposited

with the clerk of the county with whom the articles of incorporation are filed. Said corporation shall also keep an accurate account of the tolls received for traveling upon said road or bridge, or of other profits accruing to said corporation, which account shall be verified in like manner, and a copy thereof deposited with said county clerk within ten days after such annual election.

Sec. 38. At any time after the expiration of ten years from the time of taking tolls on any macadamized road, plank road, clay road or bridge, it shall be lawful for the county court of any county through which any such road or part thereof shall pass, or in which such bridge may be situated, to pay to such corporation the amount of money expended by it in the construction of such road or bridge, and keeping the same in repair, and all other necessary expenses, including any sums paid for lands appropriated by such corporation, together with interest on said account and sums of money, at the rate of twenty per centum per annum, after deducting from said amount the tolls and other profits annually received by said corporation, and after the payment of the amounts expended in constructing and keeping in repair said road or bridge and other necessary expenses incurred in or about the same and interest thereon, less the amount received by such corporation, the said road or bridge shall become free for public travel.

Sec. 39. The foregoing section shall not be construed so as to prohibit said county court, at any time before the expiration of said period of ten years, from purchasing said road or bridge, for any sum that may be agreed upon by the said county court and corporation.

MODE OF PROCEEDING TO APPROPRIATE LANDS BY PRIVATE CORPORATIONS.

Sec. 40. Whenever any corporation, authorized as in the provisions of this act to appropriate lands or right of way, is unable to agree with the owner thereof as to the compensation to be paid therefor, or if the owner be absent from the State, such corporation may maintain an action in the circuit court of the proper county against such owner, for the purpose of having such lands appropriated to its use,

and for determining the compensation to be paid to such owner therefor.

Sec. 41. Such action shall be commenced and proceeded in to a final determination in the same manner as an action at law, except as in this title otherwise specially provided.

Sec. 42. The action shall be commenced against the person in actual possession of the land at the time, or if the property be not in actual possession of any one, then against the person acting as the owner thereof, or if there be no one in actual possession, or acting as the owner thereof, then against an owner unknown.

Sec. 43. The complaint shall describe the land sought to be appropriated, with convenient certainty. If the defendant, or either of several defendants, is a non-resident of this State, or unknown, service of the summons may be made by publication, as in ordinary cases.

Sec. 44. A defendant in actual possession may, for answer, plead that he is in possession only as the tenant of another, naming him and his place of residence, if known, and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and thereafter the action shall proceed in all cases as if originally commenced against him.

Sec. 45. The defendant, in his answer, may set forth any legal defense to the appropriation of such lands, or any portion thereof; or omitting such defense, aver the true value of the land in question, or the damage resulting from the appropriation thereof, or both.

Sec. 46. Upon the motion of either party, before the formation of the jury, the court, upon the request of either party, shall order a review of the lands in question, and upon the return of the jury the evidence of the parties may be heard, and the verdict of the jury given.

Sec. 47. Upon the payment into court of the damages assessed by the jury, the court shall give judgment, appropriating the lands in question to the corporation, and thereafter such lands are the property of such corporation.

Sec. 48. Either party to the action may appeal from a judgment therein, in like manner and with like effect, as in ordinary cases; but such appeal shall not stay the proceedings so as to prevent such corporation from taking such lands into possession and using them for the purposes of the corporation.

Sec. 49. The costs and disbursements of the defendant shall be taxed by the clerk and recovered of the corporation; but if it appears that such corporation tendered the defendant, before commencing the action, an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements of the defendant.

Sec. 50. If any judgment in such action be reversed, and a new trial had, and at such second trial the jury assess the damages of the defendant at a greater sum than before, the court shall, in addition to the judgment appropriating the land, as provided in section 44, give judgment in favor of the defendant for such excess.

Sec. 51. If the defendant accept the damages paid to the clerk, he waives his right of appeal, and if he do not, such sum shall remain in the control of the court, to abide the event of the appeal, and if the defendant or unknown owner of the land do not appear and claim the same, it shall be invested for the benefit of whom it may concern, as in case of unclaimed moneys in the sale and partition of lands.

Sec. 52. Whenever the law authorizes private real property to be appropriated to public uses, the same may be entered upon, examined, surveyed and selected, in the mode prescribed by the statute giving such authority, and thereafter the State, county, or other municipal or public corporation therein, seeking and authorized to make such appropriation, may proceed in the mode in this title prescribed, to have such property appropriated, and the compensation therefor determined and paid, and not otherwise; except that the compensation in the case of such State, county, municipal or public corporation, is paid by the deposit in court of an order duly drawn upon the treasurer thereof, for the amount of such compensation.

An act to amend an act relating to private corporations, their formation and the appropriation of land for corporate purposes. Approved October 24th, 1866.

Section 1. Be it enacted by the Legislative Assembly of the State of Oregon:

That section nineteen, title one, of chapter eight of said act be amended to read as follows:

Sec. 19. Any corporation organized under the provisions of this act may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock, or the amount of the shares thereof, authorize the dissolution of such corporation, and the settling of its business, and disposing of its property, and dividing its capital stock in any manner it may see proper.

Section 19, page 663, amended in 1866.

An act to amend the law of this State in relation to private corporations. Approved Oct. 24th, 1866.

Section 1. Be it enacted by the legislative assembly of the State of Oregon:

Section six, of Chapter eight of the General Laws of this State, relating to the formation of private corporations, is hereby amended so as to read as follows:

Sec. 6. The corporators, or any portion of them designated by a majority of the whole number, are authorized to open books and receive subscriptions to the capital stock of the corporation, and as soon as such capital stock has been subscribed, they shall give notice to the subscribers to meet at such time and place as they may designate, for the purpose of electing not less than three directors, as the stockholders present shall determine; provided, that it shall be lawful in the organization of any corporation to elect a board of directors as soon as one-half of the capital stock has been subscribed.

Sec. 2. Section eleven of said Chapter eight is hereby amended so as to read as follows:

Sec. 11. There shall be an annual election of directors, and at each election after the first, the president of the corporation shall act as inspector of the election, and certify

who are elected directors. The directors chosen shall hold their offices for one year thereafter, and until their successors are elected and qualified. The powers vested in the directors may be exercised by a majority of them, and any less number may constitute a quorum at all regular and stated meetings authorized by the by-laws of the corporation, in all cases when either the directors or incorporators shall have filed with the secretary of state and county clerk a written statement, designating such less number sufficient to form a quorum; and insurance companies formed under this law may designate in their articles of incorporation what amount of percentage of the capital stock shall be required to be paid in before commencing business, and the stockholders shall be liable for the residue of the stock held by them respectively, when the business or liability of the corporation shall require it. Section eleven, pages 661 and 662, General Laws, amended in 1866.

An act to amend Section 12, of Title 1, of Chapter 8 of the General Laws, approved Oct. 28, 1868.

Be it enacted by the legislative assembly of the State of Oregon:

Section 1. That section 12 of the act relating to private corporations be amended so as to read as follows:

Sec. 12. Every corporation organized under this act shall keep a stock-book in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid and the amount due thereon, if any, and all transfers thereof; which stock-book, or a certified copy thereof, as to the items in this section specified, as well as all other books of the corporation necessary for carrying on its business, shall be subject to the inspection, at all reasonable hours, of any person interested therein and applying therefor. (Section 12, page 662, General Laws, amended in 1868.)

"B."

Chap. CCXIII. An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State.

Be it enacted by the Senate and House of Representatives

of the United States of America in Congress assembled: That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Eugene City, by way of Middle Fork of Willamette river, and the most feasible pass in Cascade Range of mountains near Diamond peak, to the eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width, on each side of said road.

Provided, that the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever. And provided, further, that any and all lands heretofore reserved to the United States by act of Congress or other competent authority, be and the same are reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way is granted.

Sec. 2. And be it further enacted, that the said lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the government of the United States free from tolls or other charge upon the transportation of any property, troops or mails of the United States.

Sec. 3. And be it further enacted, that said road shall be constructed with such width, graduation, and bridges, as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

Sec. 4. And be it further enacted, that the lands hereby granted to said State shall be disposed of only in the following manner, that is to say: that a quantity of land not exceeding thirty sections for said road may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed; and if said road is not

completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States.

Approved July 2d, 1864.

"C."

An act to amend an Act entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That an act entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State," be amended as follows: "That there be, and is hereby granted to said State, for the purposes aforesaid such odd sections or parts of odd sections, not reserved or otherwise legally appropriated, within six miles on each side of said road, to be selected by the surveyor general of said State, as shall be sufficient to supply any deficiency in the quantity of said grant, as described, occasioned by any lands sold or reserved, or to which the right of pre-emption or homestead have attached, or which for any reason were not subject to said grant within the limits designated in said act."

Approved December 26th, 1866.

"D."

An act donating certain lands to the Oregon Central Military Road Company.

Whereas, the last session of Congress of the United States passed a certain act, donating lands to the State of Oregon, which act is here set forth, to wit: "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the southern or eastern boundary of said State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

"Section 1. That there be and hereby is granted to the State of Oregon, to aid in the construction of a military wagon road from Eugene City by way of middle fork of the Willamette river, and the most feasible pass in the Cascade range of mountains near Diamond peak, to the southern or eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of the road.

Provided, that the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever. And, provided further, that any and all lands heretofore reserved to the United States by act of Congress or other competent authority be and the same are reserved from the operation of this act, except so far as may be necessary to locate the route of said road through the same, in which case the right of way is granted.

"Sec. 2. And be it further enacted: That the said lands hereby granted to said State shall be disposed of by the legislature thereof, for the purpose aforesaid and for no other; and the said road shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property, troops or mails of the United States.

"Sec. 3. And be it further enacted: That said road shall be constructed with such width, graduation and bridges, as to permit of its regular use as a wagon road and in such other special manner as the State of Oregon may prescribe.

"Sec. 4. And be it further enacted: That the lands hereby granted to said State shall be disposed of only in the following manner, that is to say: that a quantity of land not exceeding thirty sections for said road may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time till said road is completed; and if said road is not completed within five years, no further sales shall

be made, and the land remaining unsold shall revert to the United States." Therefore,

Be it enacted by the legislative assembly of the State of Oregon:

Section 1. That there is hereby granted to the Oregon Central Military Road Company, all lands, right of way, rights, privileges and immunities heretofore granted or pledged to this State by the act of Congress, in this act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed.

Sec. 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State, to aid in the construction of such road, for the purposes and upon the conditions and limitations herein mentioned or which may be mentioned in any future grant of money or lands to aid in constructing such road.

Sec. 3. Inasmuch as there is no law upon this subject at the present time, this act shall take effect from and after its passage.

Approved October 24th, 1864.

"E."

An act to amend an act entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

Whereas, by an act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State, approved July second, eighteen hundred and sixty-four, and whereas, the time designated for the completion of said road expires on the second day of July, eighteen hundred and sixty-nine: Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the time for the completion of said road be, and hereby is, extended to the second day of July, eighteen hundred and seventy-two.

Approved March 3d, 1869.

"F."

DEPARTMENT OF THE INTERIOR,
General Land Office,
March 2nd, 1870.

Hon. H. W. Corbett, U. S. Senate. SIR: I have the honor to acknowledge the receipt of map of the "Oregon Central Military Road" of Oregon, filed on the 28th ult. It is found to be duly authenticated, and also, certificate of Governor of said State attached thereto, certifying the completion of said road from Eugene City to the eastern boundary of said State, in pursuance of the act of Congress of 2nd July, 1864.

Instructions will issue at an early day, of which you will be advised, in regard to the withdrawal of lands along the extended surveys.

With great respect, your obedient servant,

JOS. S. WILSON,
Commissioner.

EXECUTIVE OFFICE,
Salem, Oregon, January 25th, 1872.

UNITED STATES OF AMERICA, } ss.
STATE OF OREGON. }

I, S. F. Chadwick, Secretary of State of the State of Oregon, hereby certify that certified transcripts of the following lists of lands enuring to the State of Oregon under acts of Congress approved July 2d, 1864, December 26th, 1866, and March 3d, 1869, and granted to the Oregon Central Military Company by the act of the Legislative Assembly of the State of Oregon, approved October 24th, 1864, duly approved by the Secretary of the Interior of the United States of America, have been transmitted by the Department of the Interior of the United States to the Governor of this State, and now remain on file in the Executive office, to wit:

List No. 1,	containing	19,153 73–100	acres.
" No. 2,	"	167,633 57–100	acres.
" No. 3,	"	23,475 66–100	"
" No. 4,	"	113,504 91–100	"
" No. 5,	"	9,641 14–100	"
Making an aggregate of		333,409 1–100	"

In witness whereof I have hereunto set my hand and affixed the seal of the State of Oregon this 26th day of January, in the year of our Lord one thousand eight hundred and seventy-two.

[Seal of the State of Oregon.] S. F. CHADWICK,
Secretary of State.

PORTLAND, Oregon, January 23, 1872.

W. S. Ladd, Esq., President of the Oregon Central Military Road Company.

SIR: In accordance with your request we have carefully examined the abstract of the title submitted to us of the Oregon Central Military Road Company to the lands granted to the State of Oregon by the act of Congress, entitled "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," approved July 2d, 1864, and by an act of Congress amending said act, approved December 26th, 1866, and from such examination we arrive at the following conclusions as to the construction of the several acts of Congress, under which your company claims its land grant.

By the said act of Congress of July 2d, 1864, there was granted to the State of Oregon alternate sections of public lands, designated by odd numbers, for three sections in width on each side of a military wagon road from Eugene City to the eastern boundary of the State, being three sections of land for every mile in length of the road; and by the amendment of said act, approved December 26th, 1866, there was granted to the State of Oregon such odd sections, or parts of odd sections not reserved or otherwise legally appropriated, within six miles on each side of said road, to be selected by the Surveyor General of the State, as should be sufficient to supply any deficiency in the quantity of said grant, as made by the said act of July 2d, 1864, occasioned by any lands sold, reserved, or to which the rights of preemption or homestead had attached, or which for any reasons were not subject to said grant within the limits designated in said act.

This amendatory act is intended to supply or make up any deficiency in the amount of three full sections to

the mile of the road, arising from any former reservations as specified in the act, and also from any deficiency arising from rights of settlers attaching prior to the passage of that act, on the location of the road, under the homestead and pre-emption or other laws of the United States, as it was only, of course, the then title of the United States that could pass by the grant.

As fast as it is ascertained that any such deficiency exists within the three-mile limits, the company has the right to select such indemnity lands within the six-mile limits provided by the amendatory act.

These grants being in terms *in presenti* vested the title of the United States immediately in the State of Oregon.

Such title to acquire *precision* of *locality*, as to the lands within the limits of the first grant, by the location of the road and the extension of the United States surveys, and as to the indemnity lands granted by the amendatory act by their selection by the amendatory act, by their selection by the Surveyor General of the State, as provided in the act. The title vests by virtue of the acts of Congress, and no patent is required.

8 Opinions Attorney General, 247, 255.

9 Opinions Attorney General, 41.

Lesseiur et al. v. *Price*, 12 How. U. S. Rep. 59.

A grant is the highest muniment of title known to the law.

11 Opinions Attorney General, 47.

In our own opinion the only restricton placed upon the disposal of these lands by the State was that they should be disposed of, that is by the State, only as the road was completed, or not to exceed thirty sections in advance of the completion of the road, and if the road was not built within the time limited by the act of Congress the lands for the uncompleted portion of the road were to revert to the United States. This time was by the first act five years from the passage of the act, and the time was extended by the Amendment of March 3, 1869, until the 2d day of July, 1872.

It appears, from the official letter of the Commissioner of the General Land Office, made part of your abstract of title, that the road has been accepted by the Governor of Or-

egon within the time allowed by these acts of Congress and the certificate of such acceptance filed in the Department of the Interior.

The act of the legislative assembly of the State of Oregon, made exhibit "D" of your abstract, grants *in presenti* to your company all lands, right of way, privileges and immunities theretofore granted to the State of Oregon, and grants and pledges, such as should thereafter be granted to the State to aid in the construction of your road, subject to the conditions and limitation of the grant.

Our conclusion from the said several acts of Congress, and based upon the documents and statements of the abstract of title submitted, is that there was granted to your company the fee of the alternate sections of the public lands of the United States for three sections in width upon each side of your road, as located, except such odd sections, if any, as were, before the date of said act reserved to the United States, or to which before the location of your road prior rights had attached under the pre-emption or homestead or other laws of the United States, that the title so granted has acquired precision of location as to such portions of the lands as have been selected, listed and approved, the right of the company to such lands as to the United States being adjusted by the land office by that process, and that the limits of the grant have been determined by the location of the road, but that the *precise location of the lands within the three mile limits* will be fixed only by the extension of the government surveys, and that the title of your company to the indemnity lands not yet selected, if any, is a floating grant, nevertheless a grant *in presenti* which will acquire precision of location, by the selection and listing of said lands, and the approval of said lists by the Secretary of the Interior of the United States.

Your company has unquestionably the absolute right to dispose of the whole, or any portion of its lands under said grants, at such times, in such manner, and upon such terms, as the company may determine, and the purchaser will acquire the same right of selecting and listing the unsurveyed portions of the grant that your company now has.

As fast as the road was completed and accepted and the Governor's certificate of acceptance filed in the Department of the Interior of the United States, the condition of the grant was complied with, and your company took the absolute fee to such lands as it was entitled to receive under the grant, with the immediate, unqualified right of disposal.

Respectfully yours,

MITCHELL & DOLPH,

Attorneys and Counselors at Law, Portland, Oregon.

STATE OF OREGON, }
County of Marion. } ss.

I, J. N. Dolph, an attorney of the Supreme Court of the State of Oregon and a member of the late firm of Mitchell & Dolph, certify that the within abstract was exhibited to me upon the 19th day of October, A. D. 1874, and at said date there were no liens or incumbrances upon the lands of the Oregon Central Military Road Company therein described. That the whole of said lands and land grant have been conveyed to B. J. Pengra. An undivided half by deed of May 12th, 1874, and an undivided half by deed dated October 12th, 1874, excepting small portions theretofore sold reserved in said deeds not exceeding seven thousand acres.

Salem, October 19th, 1874.

J. N. DOLPH.

STATE OF OREGON, }
County of Lane. } ss.

I hereby certify that there are no liens or incumbrances of record in this office upon any of the Oregon Central Military Road Lands, one-half of which were conveyed by B. J. Pengra and his wife, C. E. Pengra, May 15th, 1874, to G. W. Colby, John Boggs, N. D. Rideout, Edgar Mills, E. B. Pond, Nicholas Lunning, W. H. Parks, W. C. Belcher and T. B. Simpson, each an undivided one-tenth of the one-half, and to W. H. and R. F. Parks jointly one-tenth of one-half. The other one-half conveyed by said Pengra and wife on the 15th day of October, 1874, to G. W. Colby four-twentieths, to Nicholas Lunning, E. B. Pond, J. M. Peck, Isaac Allen, B. F. Baker and M. P. Jones, each two-twentieths;

to C. H. Holbrook, W. C. Belcher, N. D. Rideout and Isaac Lohman, each one-twentieth, excepting the reservations in said deeds made, not exceeding seven thousand acres.

Witness my hand and official seal this 22d day of October, A. D. 1874.

[SEAL] JOEL WARE,
County Clerk of Lane County, Oregon.

STATE OF OREGON,
County of Jackson. } ss.

I hereby certify that there are no liens or incumbrances of record in this county upon any of the Oregon Central Military Road lands as conveyed by B. J. Pengra and his wife, C. A. Pengra, on May 15th, 1874, and October 15th, 1874, to G. W. Colby and others.

Witness whereof, I have hereunto set my hand and the seal of the County Court of the county aforesaid this 24th day of October, 1874.

E. D. FONDREY, County Clerk.

Endorsed: Abstract, California and Oregon Land Co. To Lands—Oregon Central Military Road.

Filed November 23, 1891.

R. H. LAMSON, Clerk.

UNITED STATES OF AMERICA,
District of Oregon. } ss.

I, R. H. Lamson, Clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify the foregoing pages, numbered 1 to 320, to be a true and complete transcript of the record and proceedings had in said court in a certain cause wherein the United States is plaintiff and the Oregon Central Military Road Company and the California and Oregon Land Company et al. are defendants, as the same appears from the records and files of said court, now in my office and under my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at Portland, in said district, this second day of January, in the year of our Lord, one thousand eight hundred and ninety-two.

[SEAL] R. H. LAMSON, Clerk of said Court.
By R. B. LAMSON Deputy Clerk.

And afterwards, to wit: on the 8th day of January, 1892, there was duly filed in said Circuit Court of Appeals a præcipe for appearance of appellee, in words and figures as follows, to wit:

United States Circuit Court of Appeals for the Ninth Circuit.

No. 22, October Term, 1891.

THE UNITED STATES, Appellants,
vs.
THE CALIFORNIA AND OREGON LAND COMPANY, Appellee.

The Clerk will enter my appearance as counsel for the appellee.

W. C. BELCHER.

(Indorsed): No. 22. U. S. Circuit Court of Appeals for the Ninth Circuit. October Term, 1891. Præcipe for entry of appearance. Filed Jan'y 8, 1892.

F. D. MONCKTON, Clerk.

And afterwards, to wit: on the 11th day of January, 1892, there was duly filed in said Circuit Court of Appeals a præcipe for appearance of appellants, in words and figures as follows, to wit:

United States Circuit Court of Appeals for the Ninth Circuit.

No. 22, October Term, 1891.

THE UNITED STATES, Complainant and Appellant,
vs.
THE OREGON CENTRAL MILITARY ROAD COMPANY, *et al.*

The Clerk will enter my appearance as counsel for the complainant and appellant.

FRANKLIN P. MAYS,
U. S. Atty. for Oregon.
ALBERT H. TANNER.

(Indorsed): No. 22. U. S. Circuit Court of Appeals for the Ninth Circuit. October Term, 1891. Præcipe for entry of appearance. Filed Jan'y 11, 1892.

F. D. MONCKTON, Clerk.

And afterwards, at a stated term, to wit: the October term, A.D. 1891, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the

City and County of San Francisco, on Thursday, the 21st day of January, in the year of our Lord, one thousand eight hundred and ninety-two; present: The Honorable C. H. Hanford, District Judge, District of Washington, presiding; Honorable Thomas P. Hawley, District Judge, District of Nevada, and Honorable William W. Morrow, District Judge, Northern District of California; the following proceedings were had in said cause, to wit:

THE UNITED STATES OF AMERICA, Appellants,
vs.
CALIFORNIA AND OREGON LAND CO. } No. 22.

Appeal from U. S. Circuit Court, District of Oregon.

It is ordered that the appeal herein be argued by A. H. Tanner, Esq., counsel for appellants, and Rufus Mallory and W. C. Belcher, Esq., counsel for appellee, and that the same be submitted to the Court for consideration and decision.

And afterwards, at a stated term, to wit: the October term, A. D., 1891, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Thursday, the 10th day of March, in the year of our Lord one thousand eight hundred and ninety-two; present: The Honorable C. H. Hanford, U. S. District Judge, District of Washington, presiding; Honorable Thomas P. Hawley, U. S. District Judge, District of Nevada; and Honorable William W. Morrow, U. S. District Judge, Northern District of California; the following proceedings were had in said cause, to wit:

United States Circuit Court of Appeals for the Ninth Circuit.

No. 22, October Term, 1891.

THE UNITED STATES, Appellants,
vs.
THE CALIFORNIA AND OREGON LAND COMPANY.

Appeal from the Circuit Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Oregon and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, and the cause is remanded to said Circuit Court of the United States for the District of Oregon.

March 10, 1892.

And ~~afterwards~~ on the same day, to wit: on the 10th day of March, 1892, there was duly filed in said Circuit Court of Appeals, an opinion by the Court, Hanford, J., dissenting; which opinion is in words and figures as follows, to wit:

United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, Appellants,
vs.
THE CALIFORNIA AND OREGON LAND CO. } No. 22.

Appeal from the Circuit Court of the United States for the District of Oregon.

Before HANFORD, HAWLEY and MORROW, JJ.

STATEMENT OF THE CASE.

This cause has been heard twice by the United States Circuit Court for the District of Oregon, and once by the Supreme Court of the United States. The opinions of the Circuit Court on the first hearing, and of the Supreme Court, each containing a full statement of the facts and circumstances from which the case has arisen have been published and reference thereto is made for the purpose of this opinion, in lieu of a more extensive and detailed statement. See U. S. *v.* Dalles Military Road Company, 41 Fed. Rep. 493; U. S. *v.* Oregon Central Military Road Company, ib. 501; U. S. *v.* Dalles Military Road Company, and kindred cases, 140 U. S. 599. After being remanded to the Circuit Court, the case went to trial upon issues joined by a replication to the pleas and answer of the defendant, the California and Oregon Land Company, denying the allegations of the said defendant that the several promoters and organ-

izers of said company were *bona fide* purchasers of the land in controversy, for the full value thereof, without notice or reason to believe, or suspect that there had been any fraudulent act committed or misrepresentation made, affecting the title of their vendors, or that the wagon road in aid of which the lands were granted, had not been wholly, seasonably and properly completed in accordance with the requirements of the granting acts. The pleadings admit, but only by implication, that the wagon road was never constructed and that the certificates given by the Governor of Oregon were untrue. The only issue of fact in the case, is made by the second plea, which is a negative plea, raising simply a question, whether the defendant is entitled to the protection which a Court of Equity gives to *bona fide* purchasers of the legal title to real estate. The Circuit Court so construed the pleadings and held the parties strictly within the limits of that issue in the introduction of evidence, and even made a ruling excluding all evidence offered on the part of the Government to prove that the wagon road had never been constructed. Upon the final hearing, the following decree was rendered by the Circuit Court: "This cause was heard upon the bill, the amended pleas and answer of the defendant, the California and Oregon Land Company, the replication thereto, the testimony and exhibits, and was argued by Mr. Franklin P. Mays, United States Attorney, and Mr Albert H. Tanner, of counsel for the plaintiff, and Mr. Rufus Mallory for said defendant; on consideration whereof the Court finds that the certificates of the Governor of Oregon declaring the road mentioned in the bill to have been duly constructed were truthfully made without fraud or misrepresentation on the part of any one; and that said defendant, the California and Oregon Land Company, is the purchaser of the land described in said bill from the Oregon Central Military Road Company, in good faith, for a valuable consideration, and without notice of any fraud or misrepresentation on the part of said Oregon Central Military Road Company, or any one else. It is therefore ordered, adjudged and decreed, that said plea of said defendant be, and the same is hereby sustained, and that said bill of complaint be, and the same is hereby dismissed, as to the said defendant, the California and Oregon Land Company."

HAWLEY, J.—I am of opinion that the Circuit Court did not err in finding that defendant was the purchaser of the land in question in good faith and for a valuable consideration without notice of any fraud on the part of the Oregon Central Military Road Company or any one else

This finding is in my opinion fully sustained by the evidence and the Court was therefore justified in sustaining the defendant's objection to the testimony offered by complainant after the defendant had rested its case to show that said road had never been built and that the certificates of the Governors of Oregon that it was built were obtained by misrepresentation and fraud.

In Colorado Coal Co. *v.* United States, 123 U. S. 313, the Court said: "It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a *bona fide* purchaser for value without notice is perfect."

Applying the principles therein announced to the facts presented by the record in this case it necessarily follows that the question whether the road was actually built or not was wholly immaterial unless it was shown that defendant was a purchaser with notice. Independent of the general principles of law that are always applied by courts where the plea of a *bona fide* purchaser for value is presented, the Act of Congress authorizing this and other suits to be brought to forfeit the lands hitherto granted, expressly preserved the rights of such purchasers in the following language: "Saving and preserving the rights of all *bona fide* purchasers of either of said grants or any portion of said grants for a valuable consideration if any such there be. Said suit or suits shall be tried and adjudicated in

like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried." (25 Stats. at Large, 851.)

Without discussing the evidence it is perfectly clear to my mind that defendant was a *bona fide* purchaser for value without notice. This must be admitted unless it be that the deeds from the Oregon Central Military Road Company to Pengra were quit-claim deeds, pure and simple and that a purchaser under a quit-claim deed cannot claim to be a *bona fide* purchaser for value.

A full investigation of that question would open up a wide field of inquiry in regard to which I deem it unnecessary to enter at any length.

There are numerous and many conflicting authorities upon this subject which I shall not attempt to review.

It is sufficient to say that in my opinion the weight of reason and authorities is made to depend upon the real character of the deed as to whether or not it purports to convey, or does in fact convey, simply the speculative right, title and interest of the party, or whether or not it purports to convey and does in fact convey the lands mentioned. If the deed is a quit-claim in the strict sense of that species of conveyance, then it will not support the defense of an innocent purchaser.

"Whether the conveyance be a quit-claim or not, is dependent upon the intent of the parties to it, as that intent appears from the language of the instrument itself. If the deed purports and is intended to convey only the right, title and interest in the land, as distinguished from the land itself, it comes within the strict sense of the quit-claim deed, and will not sustain the defense of innocent purchaser. If it appears that it was the intention to convey the land itself, then it is not such quit-claim deed, although it may possess characteristics peculiar to such deeds. The use of the word quit-claim does not restrict the conveyance if other language employed in the instrument indicates the intention to convey the land itself." (Garrett *v.* Christopher, 74 Tex. 453).

The true character of the deed and the real intent of the

parties, is to be determined by the terms of the conveyance itself.

This general idea is fully recognized by the decisions of the Supreme Court of the United States. In Van Rensselaer *v.* Kearney, 11 How. 322, the Court, in speaking of the effect of a deed by way of release or quit-claim of the grantor's right, title and interest, said: "But this principle is applicable to a deed of bargain and sale by release or quit-claim, in the strict and proper sense of that species of conveyance. And, therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted."

The language of the first deed conveying an undivided one-half interest to Pengra, dated May 12th, 1874, is as follows: "The Oregon Central Military Road Company has aliened, released, granted, bargained, and sold, and does hereby alien, release, grant, bargain, sell and convey unto the said B. J. Pengra, the party of the second part, his heirs and assigns, the undivided one-half of all the right, title and interest of the said party of the first part in and to all the lands lying and being in the State of Oregon granted or intended to be granted to the State of Oregon by the Act of Congress approved July 2nd, 1864, granted by the State of Oregon to the said Oregon Central Military Road Company by an Act of the Legislative Assembly of said State of Oregon, approved October 24th 1864, and the undivided one-half of the right, title and interest of said party of the first part to said grant of land under the several Acts aforesaid, whether listed and approved or otherwise; also the undivided one-half of all future right, title, interest, claim, property and demand which the party of the first part may at any time hereafter acquire to any lands by virtue of any

further compliance with the requirements of said Acts of Congress, together with the hereditaments and appurtenances. * * * *To have and to hold the lands hereby granted* unto the said party of the second part, his heirs and assigns forever."

From this language, as well as of all the other conditions, reservations and covenants in said deed expressed, it is clear to my mind that the parties intended by this instrument to convey, and did convey, the land itself, and that it is not such a quit-claim deed as deprives defendant of the right to rely upon the plea of an innocent purchaser for value. The second deed contains the same language as the first. The deeds from Pengra to Colby and others are regular bargain and sale deeds of the land in question.

From a careful consideration of all the evidence in the record, and of the principles of law applicable thereto, I am of opinion that the decision and rulings of the Circuit Court were correct.

I am authorized to say that Judge MORROW concurs with me in the views I have expressed.

The judgment of the Circuit Court is therefore affirmed.

Endorsed: Filed Mar. 10, 1892. T. D. Stanchfield, Clerk.

And on the same day, ~~afterwards~~, to wit: on the 10th day of March, 1892, there was duly filed in said Circuit Court of Appeals an opinion by HANFORD, J., dissenting; which opinion is in words and figures as follows, to wit:

United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES
vs.
THE CALIFORNIA AND OREGON LAND COMPANY.

Opinion filed March 10th, 1892.

Franklin P. Mays, United States Attorney,
Albert H. Tanner, Special Assistant U. S. Attorney,
For Appellant.

Rufus Mallory and W. C. Belcher, for Appellee.

Before HANFORD, J., HAWLEY, J., MORROW, J.

DISSENTING OPINION.

HANFORD, J.—The Supreme Court reversed the first decree of the Circuit Court for error in refusing to allow a replication to the pleas, and remanded the cause for the express purpose of having a full investigation and determination of the facts, in the light of all the testimony affecting the question of the *bona fides* of the transactions by and through which the defendant has, or claims to have acquired title to the land. The important questions of law involved in the case and which were fully discussed in the opinion of the Circuit Judge, are only referred to in the briefest manner by the Supreme Court. The Court could not, after making the careful and full statement of the case included in its opinion, have passed over these questions through mere inadvertence. Evidently, except in so far as it was intended to reverse the decision made by the Circuit Judge, the Supreme Court intentionally refrained from expressing an opinion upon the questions of law, until there could be a full presentation of the case and a decision of all questions of law and fact after the introduction of the evidence. The Act of Congress authorizing the suit expressly mentions as one of the subjects to be adjudicated, the question as to the legal effect of the certificates of the Governor of Oregon. The Circuit Judge decided that question, and in deciding it affirmed the validity of the defendant's title to the land, but the Supreme Court did not by any expression in its opinion approve or criticise the decision of that question. We can hardly suppose that the Court intended to dispose of the case finally by simply reversing the decision of the Circuit Court without giving some expression of opinion upon this important question, therefore we may fairly infer that the question has been reserved for future consideration by that Court. The grounds of the Supreme Court's decision appear in the following extracts therefrom: "We are of opinion that the Circuit Court erred in not permitting the plaintiffs to reply to the pleas, and in dismissing the bill absolutely. * * * The decree must be reversed in so far as it dismisses the bill, and the case be remanded to the Circuit Court, with a direction to allow the plaintiff to reply to, and join issue on, the pleas. * * *

It is manifest that, although the Act says that the suits are to be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity, Congress intended a full, legal investigation of the facts, and did not intend that the important interests involved should be determined upon the untested allegations of the defendants. * * * The Government has had no opportunity to prove the charges of fraud made in the bill, and there is no proof but the allegations of the pleas as to the *bona fides* of the defendants, and as to the amounts expended by them in good faith in connection with the roads or the lands. It cannot be properly held that, under the Act of 1889, final adjudication can be made on such pleadings alone, as to the extensive interests involved in this litigation."

In view of the course which the case has already taken, it seems to be unnecessary if not improper for this Court at the present time to do more than decide whether, upon the evidence, the defense of a *bona fide* purchase has been made out, and whether the Court erred in excluding evidence material for the Government. The latter inquiry being of an incidental and preliminary character will be first disposed of.

The facts as to the completion of the road, or failure to construct it, are important matters of evidence bearing directly upon the question at issue, as to whether the defendants, at the time of the purchase of the land from the Oregon Central Military Road Company, had notice of the failure of that company to earn the grant by constructing the road. The existence of such an important highway, extending from the heart of the Willamette Valley to the eastern boundary of the State, if it does exist, must necessarily be a matter of such general notoriety as to be presumably within the knowledge of all business men, having the means and disposition to purchase on speculation the lands granted for the purpose of aiding in its construction, and located adjacent thereto; and the non-existence of such a highway, if, in fact, it never was constructed, is such an extraordinary circumstance when considered in connection with the transfer of the

land grant to private individuals, that without explanation, it is impossible to understand how the purchaser could have failed to have taken notice of it. The reason given for the exclusion of the evidence bearing upon this point, is that by failing to deny them, the pleas and answer admit the averments of the bill as to the non-construction of the road and the falsity of the Governor's certificates, and dispenses with the necessity of proof thereof, and that the taking of such proof would impose a grievous burden upon the parties by reason of the amount of it and the great expense and consumption of time necessary for the purpose. The Supreme Court, however, has held that the case cannot properly be decided until the proofs shall have been taken; and having remanded the cause for the express purpose of having an investigation of the facts, the trial Court is left without discretion and must proceed according to the mandate.

There is another reason for holding that the Circuit Court was in error in excluding the evidence offered by the Government. It is this: The answer does not deny, nor expressly admit the charges made in the bill that the lands were not earned according to the terms of the granting act, and that the certificates are untrue, and that the same were obtained by false representations and fraud. The plea is a negative plea, and does controvert the averments of the bill so that proof thereof is required to disprove the plea. Where the plaintiff has replied to a plea which constructively admits the averments of the bill, or the part of the bill to which it refers, he "may rest satisfied with that admission, and need not go into evidence as to that part of his case which the the plea is intended to cover; unless the plea is a negative plea; for in that case it will be necessary for him to prove the matter negatived, for the purpose of disproving the plea, in the same manner as he may enter into evidence, for the purpose of disproving matter which has been pleaded affirmatively." 1 Daniell's Chancery Pleading and Practice, 5th Ed., 837.

The answering defendant in order to prove the allegations of the second plea, was obliged to, and did introduce the deeds by which it claims to have acquired title to the land,

and to show by other evidence the particulars of the transaction attending the negotiations for and consummation of the purchase from the Oregon Central Military Road Company, from which it is clear that the promoters and organizers of the defendant corporation, first bargained with the Oregon Central Military Road Company for an undivided one-half of the lands granted, for the price of $100,000, and the right to purchase the other half at a corresponding price; that after examining an abstract of the title and obtaining the advice of eminent lawyers as to the right of said company to sell the land, they paid $100,000, and thereupon said company, by its deed granted and conveyed one-half of all the right, title and interest of said company, and one-half of the right, title and interest which it might thereafter acquire in and to said lands, to one B. J. Pengra, who on the next day after the recording of said deed, by his bargain and sale deed, conveyed the lands to the persons who afterwards organized this defendant corporation; and some five months after the conveyance of said one-half interest, the other half was conveyed in a similar manner, that is to say: The corporation first made a deed, of merely its right, title and interest in and to the property to Pengra, and he, by a bargain and sale deed, conveyed the property to the purchasers. This evidence does not sustain the plea. The rule to be applied is this: In equity a purchaser of real estate from the apparent owner thereof, who after payment of the reasonable value of the property, receives a conveyance of the legal title, without knowledge of an equitable right to the property existing in another, or, notice of facts which would cause an ordinarily prudent person to inquire into such existing equitable rights, or who, after making the inquiry and the exercise of reasonable diligence, has failed to discover an existing defect in his grantor's title, is entitled to the same protection as the purchaser of personal property in market overt. The rule is founded upon the doctrine of estoppel, which does not allow an owner of property who has permitted a concealment of his claim or rights to thereafter assert them to the prejudice of an honest purchaser unable by reason of such concealment to learn of the existence of such claim or rights in time to avoid im-

position. As in all cases where rights depend upon the doctrine of estoppel a defense of this sort requires the clearest proof of all the facts essential to create the estoppel, and equity does not permit a party to derive benefit from his own ignorance of facts which he could have learned by the exercise of ordinary prudence and diligence. This defense is not available to a person who by the circumstances connected with his purchase or the form of conveyance which he accepts, is apprised that his grantor has not intended, or is unable to convey a perfect title, without additional proof showing that the purchaser after due diligence failed to discover any valid adverse claim to the property. One who contracts for and pays the price for a particular parcel of real estate and obtains a deed which by its terms purports to convey the title to the property which it describes, occupies a position entirely different from that of the purchaser who is content to receive merely a conveyance of the right, title and interest of his grantor in and to the property. By many of the adjudged cases he is held to be chargeable with constructive notice, inherent in the deed of the actual right and title of his grantor, as contradistinguished from what may at the time appear to be, by his visible possession of the property, or muniments of title shown by the public record.

Blanchard *v.* Brooks, 12 Pickering, 47;
Springer *v.* Bartle, 46 Iowa, 688;
Steele *v.* Sioux Valley Bank, 79 Iowa, 399, 44 N. W. Rep. 564;
Peters *v.* Cartier, 80 Mich. 124, 45 N. W. Rep. 73;
Peaks *v.* Blethen, 77 Me. 510;
Logan *v.* Niell, 128 Pa. St. 567, 18 Atl. Rep. 347;
Hastings *v.* Nissen, 31 Fed. Rep. 597;
Gest *v.* Packwood, 34 Fed Rep. 372;
American Mortage Co. *v.* Hutchings, 24 Pac. Rep. 515;
3 Washburn on Real Property (4th Ed.) 607 (marginal);
2 Pomeroy's Equity, Sec. 753;
1 Devlin on Deeds, Sec. 674.

This rule, in all its rigor, has been declared and applied by the Supreme Court of the United States repeatedly. In the case of Oliver *v.* Piatt, 3 Howard, 333, the question as to the right of the grantee of a right, title and interest to property, to claim protection in equity as a *bona fide* purchaser was elaborately argued by able counsel and received careful consideration. The opinion of the Court was written by Mr. Justice Story, wherein he expressed the view of the Court as follows: "Another significant circumstance is, that this very agreement contains a stipulation that Oliver should give a quit-claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver or his heirs or assigns. In legal effect, therefore, they did convey no more than Oliver's right, title and interest in and to the property; and under such circumstances it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts."

"The general principle is admitted, that a grantor conveying by deed of bargain and sale, by way of release or quit-claim all his right and title to a tract of land, if made in good faith, without any fraudulent representation, is not responsible for the goodness of the title beyond the covenants in his deed. * * * * A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time; and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it." (Opinion of Mr. Justice Nelson in Van Rensselaer *v.* Kearney, 11 Howard, 297.)

"The evidence satisfies us that Cook had full notice of the frauds of Powers and of the infirmities of Dessaint's title. Whether this was so or not, having acquired his title by a quit-claim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases the conveyance

passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey." (Opinion by Mr. Justice Swayne in May *v.* Le Claire, 11 Wall. 217.)

The cases of May *v.* Le Claire and Oliver *v.* Piatt are cited to the same point and the doctrine is reaffirmed by the Supreme Court in Alexander *v.* Roderiguez, 12 Wall. 323, and Dickerson *v.* Colgrove, 100 U. S. 584. The Supreme Court has steadfastly adhered to the rule denying the grantee in a quit-claim deed, the right to defend as a *bona fide* purchaser against a title paramount to that which his grantor had at the time of executing the quit-claim deed. Brown *v.* Jackson, 3 Wheaton, 449, Hanrick *v.* Patrick, 119 U. S. 175.

The authorities above cited are not unopposed. Some of the ablest text writers and jurists of this country hold to the view that a grantor cannot by any form of deed do more than convey all his right, title and interest; that a quit-claim will convey a perfect fee simple title just as effectually as a warranty deed, if in fact the grantor at the time of executing the deed has such a title; that a quit-claim deed no more implies that the grantor doubts the goodness of his title, than that a warranty deed implies that the grantee considers the title unsafe without the support of covenants and assurances involving personal liability for damages; and that a purchaser who relies upon the public records showing a clear title in the grantor, even though he takes a quit-claim deed, cannot be denied the character of a *bona fide* purchaser, without robbing the recording acts of their virtue. Between these two extremes the true doctrine is to be found, and the trend of opinion in this country as may be gathered from the most recent decisions and the latest contributions from American law writers is in the direction of greater liberality and to regard with favor the more reasonable rule by which the actual good faith of the purchaser is made the test of his right in equity, and the question of actual good faith is chiefly one of fact. So that there is no such thing as a conclusive presumption of *mala fides* from the mere acceptance of a quit-claim deed. A purchaser who makes diligent and candid inquiry with intent to ascertain the truth concerning his grantor's title and who after such in-

quiry pays a fair price for property in the honest belief that the title is perfect, ought to have protection against adverse rights which notwithstanding his efforts to discover them remained concealed from him, although he receives only a quit-claim deed; and if a purchaser does upon inquiry learn of the existence of adverse rights before consummating the purchase he ought not to receive protection against such rights even though his deed is in form, an absolute grant of the property, with a general warranty and full covenants for title.

Merrill *v.* Hutchinson, 25 Pac. Rep. 215;
34 Central Law Journal 174.

This is the common sense of the matter and the only just rule. Nevertheless it is a true and self-evident proposition that by a quit-claim deed the grantee is necessarily warned. By agreeing to accept that form of conveyance he avowedly assumes all risk of a bad title as between himself and his grantor, and he may be fairly presumed to have made a timely and sufficient examination of the title. From this it follows that he may be conclusively presumed to have become informed of all facts which could have been discovered by an intelligent and earnest effort, and to have acted in the light of all such facts in making the purchase.

Within this modification of the rule to which the Supreme Court seems to be committed, it is not sufficient for the defendants to show, that by reason of their failure to inquire they were ignorant of the failure of their grantor to earn the land grant according to the terms of the Act of Congress. They must prove that they did inquire, and that notwithstanding the exercise of ordinary prudence and diligence on their part they were misinformed and deceived, and that they honestly believed that their grantor had acquired a full and complete title to the land by having constructed and completed the wagon road. This much at least is required of them to bring the case within any rule deducible from the cases cited in their behalf upon the argument. And for lack of such proof in the case as it is now before this Court the evidence is insufficient to sustain their plea.

The appellee, however, claims protection under cover of

the bargain and sale deeds from Pengra, the grantee in the quit-claim deeds from the Oregon Central Military Road Company. But Pengra did not at any time assume to deal with the property as the owner of it. He was a mere medium for the transfer of the title to the individuals to whom the corporation had contracted to convey it. Their negotiations for the purchase were not made with Pengra, as the apparent owner, but were with the officers and agents of the corporation, and they were content to finally complete the purchase and receive a conveyance in the same manner as in acquiring the one-half interest in the first instance, that is, by means of two deeds, some five months after their purchase of the one-half interest. No additional grounds for relief or protection are shown by the circumstance that two deeds were made to effect one transfer of the property. In this particular the case is analogous to the case of Baker *v.* Humphrey, 101 U. S. 494, wherein Mr. Justice Swayne, in the opinion of the Court, says: "Chapman conveyed by a deed of quit-claim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing in view of the law as if it had been made to the attorney himself. Neither of them was in any sense a *bona fide* purchaser. No one taking a quit-claim deed can stand in that relation."

For the reasons above given it is the writer's opinion that the decree of the Circuit Court ought to be reversed, and that the cause should be remanded for a new trial with directions to admit evidence offered in behalf of either party as to the completion of the wagon road, or failure to complete it, and as to any fraudulent acts or mi-representation by means whereof the certificates of the Governor of Oregon were wrongfully obtained.

Endorsed:
Filed Mar. 10, 1892. T. D. Monckton, Clerk.

And afterwards, at a stated term, to wit: the October term, A.D. 1891, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Monday, the fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two; present: The Honorable William B. Gilbert, Circuit Judge, presid-

ing; Honorable Mathew P. Deady, District Judge, District of Oregon; and Honorable William W. Morrow, District Judge, Northern District of California; the following proceedings were had in said cause, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES, Complainant and Appellant,
vs.
THE CALIFORNIA AND OREGON LAND COMPANY, Defendant and Respondent.

Now at this time comes Mr. A. H. Tanner, of counsel for the United States in the above entitled suit, and gives notice in open Court of an appeal from said cause to the Supreme Court of the United States, and files and presents a petition praying that an appeal may be allowed in said cause to the Supreme Court of the United States from the decree of this Court affirming the decree of the Circuit Court of the United States for the District of Oregon.

It is therefore ordered by the Court that the United States, complainant and appellant herein, be allowed an appeal in this cause from the said decree of this Court to the Supreme Court of the United States.

And afterwards, to wit: on the fourth day of April, 1892, there was duly filed in said Circuit Court of Appeals a citation in said cause, with admission of service indorsed thereon, in words and figures as follows, to wit:

UNITED STATES OF AMERICA } ss.

The President of the United States, to the California and Oregon Land Company, defendant and appellee, and to W. C. Belcher, Esq., its solicitor, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the third day of June next, pursuant to an appeal duly allowed by the United States Circuit Court of Appeals for the Ninth Circuit on the fourth day of April, 1892, in a cause in which the United States of America are appellants, and you are appellee, to show cause, if any there be, why

the decree rendered against the said appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William B. Gilbert, Presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this fourth day of April, A. D. 1892.

WILLIAM B. GILBERT,
Presiding Judge.

(Indorsed): Due and legal service of the within citation is hereby admitted and accepted at San Francisco, California, this fourth day of April, 1892.

W. C. BELCHER,
Solicitor for the California & Oregon Land Company, Appellee.

No. 22. U. S. Circuit Court of Appeals for the Ninth Circuit. The United States, Appellants, *v.* The California and Oregon Land Company. Filed April 4, 1892.

F. D. MONCKTON, Clerk.

UNITED STATES OF AMERICA } ss.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 340 printed pages, numbered ~~from i to iv inclusive~~, from i to iv inclusive, and from 1 to 332 inclusive, to be a full, true and correct copy of the printed record on file, and of all proceedings of record in the cause entitled The United States of America, Appellants, *v.* The California and Oregon Land Company, Appellee, No. 22, and that the same, together, constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and seal of said Circuit Court of Appeals, at San Francisco, California, this 8th day of April, A.D. 1892.

[SEAL] F. D. MONCKTON, Clerk.

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANTS,
vs.
THE CALIFORNIA AND OREGON LAND Company. } No. 1073.

THE UNITED STATES, APPELLANT,
vs.
THE DALLES MILITARY ROAD Company et al. } No. 1159.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANTS, *vs.* THE CALIFORNIA AND OREGON LAND Company.	No. 1073.
THE UNITED STATES, APPELLANT, *vs.* THE DALLES MILITARY ROAD COMpany et al.	No. 1159.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

And now, October 24, 1892, comes the Solicitor-General, on behalf of the United States, and moves the court to advance the above-named causes on the docket.

These cases involve the title to large tracts of land in the State of Oregon, the same having been granted by the United States to the State to furnish means for the construction of roads.

The State of Oregon chartered corporations to construct the roads. The title to the land passed to the State, or the assignees of the State, upon condition of the completion of the roads. The bills filed against these corporations charged that the governor's certificates, upon which patents by the United States were issued, had been obtained by fraud, and that the defendants took with knowledge of this fact.

It is deemed important to the United States, and to the people of the State of Oregon, that the questions involved should be speedily disposed of.

The cases have already been before this court (No. 1073, under the title of *The Oregon Central Military Road Co.* vs. *The United States*) and were advanced, on motion of The United States, at the October term, 1890. For the reasons above given, and more fully stated in said motion, to which reference is made, it is respectfully moved that the cases be advanced and set down for an early hearing together.

This motion is made with the concurrence of opposing counsel.

CHARLES H. ALDRICH,
Solicitor-General.

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CLERK.

In the Supreme Court of the United States.

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vs.
THE DALLES MILITARY ROAD COMPANY *et al.* } No. 1159.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLANT.

A. X. PARKER,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, appellant, *vs.* THE CALIFORNIA AND OREGON Land Company.	No. 1073.
THE UNITED STATES, appellant, *vs.* THE DALLES MILITARY ROAD Company *et al.*	No. 1159.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLANT.

STATEMENT.

These appeals are from the circuit court of appeals for the ninth circuit.

The case numbered 1073 will be first considered without regard to the differences, which are few and inconsequential, existing in the questions presented by the two cases.

This suit was brought by the Attorney-General in pursuance of the act of March 2, 1889 (25 Stat., 850), and was begun in August, 1889.

It is one of the cases known as the Oregon Wagon Road Cases, and involves questions arising out of the land grants made by the United States to the State of Oregon to aid in the construction of three wagon roads in said State.

The *first* of these *grants* in the order of time was by "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of the State," passed July 2, 1864 (13 Stat., 355); and said land grant is the subject of the suit which has now become No. 1073.

This case, with the other "Oregon Wagon Road Cases," was brought before this court during its October term, 1890, and the trial, now subject to review, was had in consequence of the decision which is set forth, 140 U. S., 599.

The law which directs the bringing of these suits refers to the statutory requirements as to the completion of the roads, and in the fourth subdivision of its preamble recites that—

> Whereas the legislature of the State of Oregon has memorialized Congress, and therein alleged that certain of said wagon roads, in whole or in part, were not so completed, and that to the extent of the lands coterminus with unconstructed portions the certifications thereof by the Department of the Interior were unauthorized and illegal, therefore, etc.

MEMORIAL OF THE STATE OF OREGON.

The statutes of the State of Oregon show the adoption of the following memorial:

February 14, 1885, the legislative assembly of the State of Oregon (laws of Oregon, 1885, p. 513), adopted the following:

[House joint memorial No. 11.]

To the honorable Senate and House of Representatives in Congress assembled:

Your memorialists, the legislative assembly of the State of Oregon, would respectfully show and petition that:

Whereas it is alleged that the Willamette Valley and Cascade Mountain Wagon Road Company, and The Dalles Military Wagon Road Company, the Oregon Central Military Wagon Road Company, have never completed their roads as required by the act granting said lands to said companies by act of Congress;

Therefore, your memorialists pray that the remaining land not yet patented to said companies be withheld from said companies until after the next regular session of the legislature of the State of Oregon, in January, 1887, in order that said acts may be investigated by said body, and your memorialists, as in duty bound, will ever pray.

Adopted by the House February 14, 1885.

W. P. KEADY,
Speaker of the House.

Concurred in by the Senate February 14, 1885.

WM. WALDO,
President of the Senate.

NATIONAL EXECUTIVE ACTION.

It is a matter of general public knowledge as well as of public documentary record that March 13, 1888, the Secretary of the Interior reported to the President of the United States the results of an investigation made upon the suggestion of the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, of the land grants which are the subjects of suits under the act of 1889.

The report is accompanied by a large amount of printed testimony and is limited to three wagon roads, including the one before us.

The Secretary says of the report of the investigation:

> It shows that a personal examination of said roads has been made as directed, and that a large mass of testimony was taken at different points in said State, which has been transcribed at length and is also herewith transmitted.
>
> The testimony is mainly that of witnesses living along these roads. In this investigation the road companies were represented by attorneys who cross-examined witnesses and submitted testimony on their own behalf.
>
> This testimony appears to conclusively establish that none of these wagon-roads were constructed according to law, and that by a rightful administration of the grants and the trust no lands should ever have become the property of the companies on whom they were attempted to be bestowed by the State.

The following is the message of the President sent to Congress, transmitting said report (see Ex. Doc. No. 124, Fiftieth Congress, first session):

To the Senate and House of Representatives:

I transmit herewith a communication of the 13th instant from the Secretary of the Interior, with accompanying papers, and submitting the draft of a proposed bill to forfeit lands granted to the State of Oregon for the construction of certain wagon roads, and for other purposes.

The presentation of facts by the Secretary of the Interior, herewith transmitted, is the result of an examination made under his direction, which has developed, as is seems to me, the most unblushing frauds upon the Government, which, if remaining unchallenged, will divert several hundred thousand acres of land from the public domain and from the reach of honest settlers to those who have attempted to pervert and prostitute the beneficent designs of the Government. The Government sought, by the promise of generous donations of land, to promote the building of wagon roads for public convenience and for the purpose of encouraging settlement upon the public lands. The roads have not been built, and yet an attempt is made to claim the lands under a title which depends for its validity entirely upon the construction of these roads.

The evidence which has been collected by the Secretary of the Interior, plainly establishing this attempt to defraud the Government and exclude the settlers who are willing to avail themselves of the liberal policy adopted for the settlement of the public lands, is herewith submitted to the Congress, with the recommendation that the bill which has been prepared, and which is herewith transmitted, may be-

come a law and with the earnest hope that the opportunity thus presented to demonstrate a sincere desire to preserve the public domain for settlers, and to frustrate unlawful attempts to appropriate the same, may not be neglected.

GROVER CLEVELAND.

EXECUTIVE MANSION,
March 20, 1888.

The act of 1889 is the result of a long-continued controversy, and it is respectfully submitted that a real trial, that shall bring to the light of judicial scrutiny all of the material facts connected with the building of these roads, the obtaining of the governor's certificates and the actual earning or the fraudulent acquirement of the land, should be had.

These suits, known as the Oregon Wagon Road cases, were brought by the Attorney-General of the United States under and in pursuance of the following law, passed March 2, 1889 (25 Stat., 850):

An act providing in certain cases for the forfeiture of wagon road grants in the State of Oregon.

Whereas the United States have heretofore made various grants of public lands to aid in the construction of different wagon roads in the State of Oregon, and upon the condition that such roads should be completed within prescribed times; and

Whereas said grants were transferred by said State to sundry corporations, who were authorized by the State to construct such wagon roads and to receive therefor the grants of lands thus made; and

Whereas the Department of the Interior certified portions of said lands to the State of Oregon upon the theory that said roads had been completed as re-

quired by the granting acts of Congress, and upon the certificate of the governor of the State of Oregon as to such completion; and

Whereas the legislature of the State of Oregon has memorialized Congress and therein alleged that certain of said wagon roads, in whole or in part, were not so completed, and that to the extent of the lands coterminous with unconstructed portions the certifications thereof by the Department of the Interior were unauthorized and illegal: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby made the duty of the Attorney-General, within six months after the passage of this act, to cause suit or suits to be brought, in the name of the United States, in the United States circuit court for the district of Oregon, against all persons, firms, and corporations claiming to own or to have an interest in the lands granted to the State of Oregon by the following-enumerated acts of Congress, to wit:

"An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State," approved July second, eighteen hundred and sixty-four;

"An act granting lands to the State of Oregon to aid in the construction of a military road from Albany, Oregon, to the eastern boundary of said State," approved July fifth, eighteen hundred and sixty-six;

"An act granting lands to the State of Oregon to aid in the construction of a military wagon-road from Dalles City, on the Columbia River, to Fort Boisé, on the Snake River," approved February twenty-fifth, eighteen hundred and sixty-seven:

To determine the questions of the seasonable and proper completion of said roads in accordance with

the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the State of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon-roads which were not constructed in accordance with requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all bona fide purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried, with right to writ of error or appeal by either or any party as in other cases; and if any person, firm, or corporation having or claiming an interest in any of said lands shall be made defendant in such suit or suits, and in the judgment of the said court be a necessary or proper party defendant, and shall not be an inhabitant of or found within the said district, and shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing said absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served upon such absent defendant or defendants in the manner provided by section eight of an act entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five: Provided, That in the said circuit

court said suit or suits shall be advanced to hearing in preference to all other civil cases on the dockets: And provided further, That no right of appeal shall exist after six months from the entering of a final decree in said circuit court.

SEC. 2. That the State of Oregon, and any person or corporation claiming any interest under or through the grants aforesaid in the lands to be affected by said suit or suits, and whether made a party thereto or not, may intervene therein by sworn petition to defend his interest therein, as against the United States or against each other, and affecting the said question of forfeiture, and may, upon such petition for intervention, also put in issue and have adjudicated and determined any other question, whether of law or of fact, which may be in dispute between said intervener and the United States, and affecting the right or title to any part of the lands claimed to have been embraced within the grants of lands by the United States to or for either of said wagon-roads. Should the lands embraced within said grants or either of them or any portion thereof be declared forfeited by the final determination of said suit or suits, the same shall be immediately restored to the public domain and become subject to disposal under the general land laws; and should the final determination of said suit or suits maintain the right of the aforesaid wagon-road grantees or their assigns to the lands embraced in said grants, the Secretary of the Interior shall forthwith adjust said grants in accordance with such determination, and shall cause patents to be issued for the lands inuring to said grantees under said wagon-road grants and which have been heretofore unpatented: Provided further, That the lands actually settled upon or occupied and used as a homestead or for agricultural or grazing purposes, in cases in which

such settler or occupant has acquired the title of the State of Oregon under the grants recited in the first section of this act to the same, not exceeding one section to any one settler or occupant, shall not be included in such suit, and such settler or occupant shall not be made a party thereto, anything in this act to the contrary notwithstanding.

Approved, March 2, 1889.

LEGISLATION RELATING TO THE OREGON CENTRAL MILITARY ROAD COMPANY.

July 2, 1864, the following law was enacted (13 Stats., 355):

CHAP. CCXIII.—An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon-road from Eugene City, by way of Middle Fork of Willamette River, and the most feasible pass in Cascade range of mountains, near Diamond Peak, to the eastern boundary of the State, alternate sections of public lands, designated by odd numbers, for three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever: *And provided further*, That any and all lands heretofore reserved to the United States by act of Congress, or other competent authority, be, and the same are, reserved from the operation of this act, except so far as it may be necessary to locate the

route of said road through the same, in which case the right of way is granted.

SEC. 2. *And be it further enacted*, That the said lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charge upon the transportation of any property, troops, or mails of the United States.

SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, graduation, and bridges as to permit of its regular use as a wagon-road, and in such other special manner as the State of Oregon may prescribe.

SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of only in the following manner; that is to say, that a quantity of land not exceeding thirty sections for said road may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed; and if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States.

Approved July 2, 1864.

The following is the enactment of the State of Oregon, passed October 24, 1864 (Laws of Oregon, 1864, p. 36):

AN ACT donating certain lands to the Oregon Central Military Road Company.

Whereas the last session of the Congress of the United States passed a certain act donating lands to

the State of Oregon, which act is here set forth, to wit, "An act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the southern or eastern boundary of said State."

(Here appears the act of Congress referred to.)

Be it enacted by the legislative assembly of the State of Oregon.

SECTION 1. That there is hereby granted to the Oregon Central Military Road Company all lands, right of way, rights, privileges, and immunities heretofore granted or pledged to this State by the act of Congress, in this act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed.

SEC. 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges, and immunities which may be hereafter granted to this State, to aid in the construction of such road, for the purposes and upon the conditions and limitations herein mentioned, or which may be mentioned in any further grant of money or lands to aid in the constructing such road.

SEC. 3. Inasmuch as there is no law upon this subject at the present time, this act shall take effect from and after its passage.

Approved, October 24, 1864.

December 26, 1866, the following law was enacted (14 Stat., 374):

CHAP. V. An act to amend an act entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act granting

lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State," be amended as follows: That there be, and is hereby, granted to said State, for the purposes aforesaid, such odd sections or parts of odd sections not reserved or otherwise legally appropriated, within six miles on each side of said road, to be selected by the surveyor-general of said State, as shall be sufficient to supply any deficiency in the quantity of said grant as described, occasioned by any lands sold or reserved, or to which the rights of preemption or homestead have attached, or which for any reason were not subject to said grant within the limits designated in said act.

Approved, December 26, 1866.

March 3, 1869, the following law was enacted (15 Stats., 338):

CHAP. CXLIII.—An act to amend an act entitled "An act granting lands to the State of Oregon, to aid in the construction of a military road from Eugene City to the eastern boundary of said State."

Whereas, by an act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of said State, approved July second, eighteen hundred and sixty-four; and whereas the time designated for the completion of said road expires on the second day of July, eighteen hundred and sixty-nine: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for the completion of said road be, and hereby is, extended to the second day of July, eighteen hundred and seventy-two.

Approved, March 3, 1869.

GENERAL ACT OF JUNE 18, 1874.

CHAP. 305.—AN ACT to authorize the issuance of patents for lands granted to the State of Oregon in certain cases.

Whereas certain lands have heretofore, by acts of Congress, been granted to the State of Oregon, to aid in the construction of certain military wagon roads in said State, and there exists no law providing for the issuing of formal patents for said lands: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Orgon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon payment of the necessary expenses thereof: Provided, That this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.

Approved, June 18, 1874.

The State of Oregon by an act passed October 14, 1862, provided, for the creation and restriction of private incorporations.

Sections 27 and 28 of said act read as follows:

SEC. 27. Any road, other than a railroad, constructed by a corporation formed under this act, shall

be cleared of standing timber for thirty feet in width of said road, and shall have a track in the center not less than sixteen feet wide, furnished and kept in good traveling condition, except when the cutting on said road is six feet or more deep on either side, in which case such track need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of such narrow track.

SEC. 28. All streams or other waters upon the line of such roads shall be safely and securely bridged, except where the county court of the county wherein the line of such road may cross such streams or other water; or if such streams or other water form the boundary between two counties, then the county court of either of said counties may authorize the corporation to place a ferryboat upon such stream or other water, to be kept and run for such toll as the county court may prescribe, and in the manner required of ferries established under the general statutes in relation to ferries, or except where such county court may authorize such corporation to connect their road with a ferry now or hereafter established over such stream or other water under the general statute in relation to ferries.

PLEADINGS.

The bill of complaint sets forth the several national and State acts which provide for the granting of the lands for the construction of the road.

It alleges that the certificates given by the governor under the legislation were obtained under fraudulent and false representations.

It is further set forth that the road never was constructed and that the acceptance of the several portions

thereof by the governor was a fraud upon the United States. It is also alleged that the officers, stockholders, agents, and representatives, and other persons acting in the interest of the defendants made false and fraudulent representations that the road had been constructed, when in truth and in fact it had not been constructed according to the law or at all. It is also alleged that the governor never made, or caused to be made, any examination of any road constructed or owned by the defendants or by the Oregon Central Military Road Company. It is also alleged that all of the certificates procured were by and through the false and fraudulent representations aforesaid, and that the acceptance of said pretended road by the governor and the acting governor, was a fraud upon the United States.

It is further alleged that the road never was built, graded, bridged, cleared, or constructed, either in whole or in part, so as to be a public highway or so as to permit of the transportation of property, troops, or mails.

It is further alleged that the proceeds of the lands were never exclusively or at all applied to the construction of the road or any part thereof, or to the building of bridges or the establishment of ferries in connection with the road.

It appears from the bill that a considerable portion of the lands have already been patented by the United States, but that a larger portion thereof still remain unpatented by the Government. It is alleged that the patents issued for said lands have been granted because the officers of the Government were deceived, misled, and imposed upon by the false and fraudulent certificates before referred to.

It is further alleged that the California and Oregon Land Company is a private corporation, purporting to

have been incorporated under the laws of the State of California, and that it is organized and is still in being.

It is also alleged that the pretended road is about 420 miles in length and that the land grant claimed in connection therewith aggregates about 720,000 acres, of which over 400,000 acres have been in effect patented, the company claiming a right to a patent for the remainder.

It is also alleged that the road was never begun, constructed, or maintained, and that each and every of the defendants well knew that the statements made in the certificates of the governors and acting governor of Oregon were false; that the governors and acting governor did not at any time examine the road, and that the said certificates had been procured by false and fradulent representations, and that patents were procured to be issued upon said false and fraudulently procured certificates.

The prayer of the petition asks to have the lands in controversy decreed to be forfeited to the United States and restored to the public domain; and that the patents and lists, and the certificates, and the deeds described, be declared fraudulent and void.

Exhibits accompany the bill of complaint and are set forth in the record showing the several lists of lands transferred to the State for the construction of the Eugene City road. Also patents running to the Oregon Central Military Road Company; and divers deeds, including the deed running to the California and Oregon Land Company.

The plea of the defendant, The California and Oregon Land Company, is set forth at p. 81 of the record. This plea alleges the granting of the lands by means of the

legislation before referred to, and recites the certification made by the governor of Oregon, and alleges that the lands were granted in pursuance of said legislation and certification, and that this defendant became the owner in fee of the principal portion of said lands.

Defendant avers that it paid the sum of $200,000 for its interest in said lands previous to the delivery of the conveyances thereof, and without reason to believe or suspect that there had been any fraudulent act or misrepresentation in the examination or certifying the completion of the road or any part thereof, or that the road had not been wholly, seasonably, and properly completed in accordance with the requirements of the granting acts.

The defendant also claims that it has expended a large sum in the care of the lands, and another large sum in payment of taxes levied thereon by the State, and that the company has received but a small sum for the sales or rents of lands.

And defendant alleges in substance, by way of plea, that it is an innocent purchaser for value, and without notice.

After the review of the case by the Supreme Court and the filing of its mandate the defendant, the California and Oregon Land Company, made and filed an amended answer, which is set forth at page 119 of the record; by this answer it is alleged that neither the officers, stockholders, or agents of the Oregon Central Military Road Company, or any one of them, or any other person or persons acting in the interest of said company, falsely

or fraudulently represented that the road had been constructed, or made other false or fraudulent representations in relation thereto.

This defendant denies any knowledge, information, or notice of the false representations or fraudulent representations and acts set forth in the complaint, and in substance denies any participation in or knowledge of wrongdoing in the premises, and claims to be an innocent purchaser for value without notice, and asserts that it had no knowledge or notice or reason to believe or suspect that there had been any fraud or misrepresentation or failure of duty in examination or certifying complained of in the complaint.

The replication filed in the case in pursuance of the decision of this court appears in the record at page 104 and is in the usual form. The replication to the amended answer, which is similar in substance and effect, is set forth at page 128:

ASSIGNMENTS OF ERROR.

First. The court erred in sustaining the objections of the defendants to the testimony offered by complainant to show that the wagon road mentioned in the bill herein was never built or constructed, and to show that the certificates of the governors, that such road was built, were obtained by misrepresentation and fraud, and in sustaining the objection to the question propounded to the witness George Joseph, to wit: "I will ask you to state fully whether or not any wagon road was ever constructed or built by the Oregon Central Military Road Company over or upon the route of said road, and state fully all that you know about the manner in which said road was built, if

any was built, whether the streams across which it was built were bridged, whether any grades were made or turnouts, and state fully the manner in which said road was built and constructed, if any such road was built, and when it was and by whom," and in excluding said testimony so offered.

Second. The court erred in sustaining the objection of said defendants to the testimony offered by complainant after the defendants had taken their testimony and rested upon the issues arising on the plea and answer filed herein; and in sustaining the said defendants' objection to the following question propounded to the witness, George Joseph:

"Question. State fully and at length all you know as to whether or not the wagon road known as the Oregon Central Military Wagon Road, referred to in the bill in this suit, was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully also all that you know in reference to the way the certificates of the governors of Oregon, that said road or portions thereof had been built, were obtained?" And in excluding said testimony so offered.

Third. The court erred in making said decree made and entered herein on the 7th day of December, 1891, sustaining the pleas of the said defendants, the California and Oregon Land Company, and in dismissing the bill of complaint as to the said defendant, the California and Oregon Land Company.

Fourth. The finding of the court in said decree, that the certificates of the governors of the State of Oregon declaring the road mentioned in the bill to have been duly constructed were truthfully made, without any fraud or misrepresentation on the part of any one, is contrary to the admissions made in the plea and answer of the said defendant and is against the evidence.

Fifth. The finding of the court in said decree, that said defendant, the California and Oregon Land Company, is the purchaser of the lands described in said bill from the Oregon Central Military Road Company in good faith and for a valuable consideration, and without notice of any fraud or misrepresentation on the part of the said Oregon Central Military Road Company or any one else, is against the evidence and contrary to law.

Sixth. The court erred in sustaining the exceptions taken by the defendants, N. D. Rideout, Edgar Mills, E. B. Pond, Nicholas Lunning, W. C. Belcher, J. W. Peck, B. F. Baker, M. P. Jones, Isaac Lohman, and the California and Oregon Land Company, to the portions of the bill of complainant herein filed and specified in said exceptions.

Seventh. The court erred in holding the governor's certificates to be binding and sufficient.

Eighth. The court erred in holding that the act of the State of Oregon of October 14, 1862, was without effect and not applicable to this road, and erred in striking from the bill of complaint the allegations setting forth a noncompliance with said act.

Ninth. The court erred in holding that the defendant was not bound by the conditions of the granting act.

Tenth. That the said decree and findings therein stated are erroneous, against the evidence, and contrary to law.

POINTS.

I.

THE STATE ACT OF 1862.

It is respectfully submitted that the court erred in holding that none of the provisions of the act of Oregon,

passed October 14, 1862, have any application to the road authorized by Congress and now under consideration.

This question is presented by the ruling appearing on page 80 of the record which strikes from the bill of the complaint (p. 5) the allegations setting forth the noncompletion of the road in accordance with the requirements of the State act of October 14, 1862.

See also eighth assignment of error (p. 136).

The said acts of Congress contained the following provision:

> That said road shall be constructed of such width, graduation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

The acts of the State of Oregon transferring the land grants provide, in the case relating to the Dalles Military Road Company, and the same in substance in the other cases—

> That there is hereby granted * * * all lands, right of way, rights, privileges, and immunities heretofore granted or pledged to this State by the act of Congress in this act heretofore recited, and for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress, upon the conditions and limitations therein prescribed.

It may be fairly inferred that the act of Congress was left indefinite because of the knowledge possessed that the State prescribed a special manner of construction.

It may also fairly be inferred that the State, in transferring the grant to the wagon-road company without special conditions, relied upon the statute of October 14, 1862, subject to which the company was incorporated, as providing valid and sufficient requirements for the construction of the highways.

Congress, in using the words "may prescribe," can not be held to have excluded existing laws; it should be held, rather, that the legislation was in view of existing law, and that the real intent was that specifications as to the construction should be subject to the State, and that the construction should be in accordance with the laws of the State in force at the time the obligation to construct should become binding. Congress did not point to some future enactment, it pointed merely to the law of the State as it should actually exist; and the fact that such law continued, instead of being afterward created, does not exempt the road company from its requirements.

Although the national and State acts, when accepted by the road company, may be held to constitute a contract, this contract must—nothing appearing to the contrary—be held to be made subject to the provisions of existing law.

That over 806,000 acres of land should be granted, first by Congress and afterward by the State, with no requirements as to the public highway to be constructed in payment therefor except that the road should be "constructed with such width, graduation, and bridges as to permit of its use as a wagon road," would be strange indeed. But this was not done.

Congress, in addition to this, required that the roads should be constructed "in such special manner as the State of Oregon may prescribe."

When the land passed to Oregon it passed under the existing applicable law of October 14, 1862.

The act of Oregon granted to the road company the land upon conditions and limitations in the act of Congress prescribed; one of these conditions was that the road should be constructed "in such special manner as the State of Oregon may prescribe," and that special manner was prescribed by the existing statute.

When the creature of the State statute, the corporation, became charged with the duty of the building the road by the acts of the State, the statute of October 14, 1862, by force of its existence, prescribed the manner in which such road should be constructed. (*Schultz* v. *Military Road Company*, 7 Or., 264.)

II.

THE CERTIFICATE THAT CERTIFIES NOTHING.

Paragraph VII of bill of complaint (Rec., pp. 8, 9) alleges fraud in the obtaining and giving of the certificate by Governor George L. Woods, and sets forth the certificate given.

The amended answer (p. 120, foot) admits the making and issuing of such certificate.

It is insisted on behalf of the complainant that this certificate is informal, insufficient, and of no effect.

It does not show an examination of the road.

It does not allege a completion of any portion of the road.

The certificate of Governor Woods certifies that—

> This plat or map * * * has been duly filed * * * and shows that portion of the road commencing at Eugene City, Oregon, and ending at the eastern boundary of the State, which has been completed as required by the act of Congress, etc.

This is no certificate of completion under the statute. It is the only certificate existing as to 238 miles of the road; that is to say, as to all of the 330½ miles of road excepting the 92½ miles covered by the two prior certificates.

The statement is that the plat or map filed shows that portion of the road which has been completed as required by the act of Congress.

This certificate is no allegation of completion, it relates only to the map, and what the map shows. This is no certificate to the Secretary of the Interior under the act of July 2, 1864, nor is it a certificate showing the road "to have been constructed and completed" as required by the act of 1874.

Considered as an alleged certificate, this paper is either plainly and fatally defective or it is a palpable evasion; in either case it is not a certificate under the law.

Any purchaser assuming to stand upon it is without support.

As a bar to the judicial investigation commanded by the people through Congress it is not entitled to attention.

III.

THE POSITION OF THE DEFENDANT.

The act of 1889 directs these suits to determine:

(1) The questions of the seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part;

(2) The legal effect of the several certificates of the governors of the State of Oregon of the completion of said roads;

(3) The right of resumption of such granted lands by the United States;

And (4) To obtain judgments, which the court is authorrized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads which were not constructed in accordance with the requirements of the granting acts;

And (5) to set aside patents which have been issued for any of such lands, saving and preserving the rights of all bona fide purchasers for a valuable consideration, if any such there be. (Sec. 1, act of March 2, 1889.)

It is necessary to conclude that Congress intended a legal investigation which would bring the facts fully before the court, and did not intend the determination of the important interests involved upon a trial which evades and escapes the tests and investigation which Congress and this court pointed out.

No full legal investigation of the facts of the disposition of this valuable portion of the public domain has yet been made.

The court below has allowed the members of the defendant corporation to come in and testify to nonparticipation in, and nonknowledge of fraud in the obtaining of the lands, and has practically eliminated all other questions and issues.

For the purposes of this appeal it is pactically admitted that the governor's certificates were fraudulently obtained, and that the road has never been built.

IV.

THE DEFENDANT IS BOUND BY THE CONDITIONS OF THE GRANTING ACTS, AND IS CHARGEABLE WITH NOTICE.

The grants of the several national granting acts are upon this explicit condition :

> *Provided*, That the lands hereby granted shall be exclusively applied in the construction of said road, and shall be disposed of only as the work progresses ; and the same shall be applied to no other purpose whatever.

The State acts grant what the State receives by the act of Congress "upon the conditions and limitations therein prescribed."

The deeds from the respective road companies *do not* profess or assume to convey any other title than that conferred upon the grantor by the act of Congress and that of the State legislature.

The deed to the defendant corporation (Exhibit N, p. 68, referred to in bill of complaint, p. 15, foot, and admitted by the amended answer, p. 123, middle) sets forth a nominal consideration, and is in the nature of a

quitclaim, and recites the origin and history of the title, and by its references and recitations fairly and clearly put the purchaser upon inquiry as to whether the purposes of the grant had been carried out, and whether its conditions had been complied with.

The act of 1874, by its concluding paragraph, limits the scope of the enactment, saying:

> This shall not be construed to revive the land grants already expired, nor to create any new right of any kind except to provide for issuing patents for lands to which the State is already entitled.

The land grants were to be exclusively applied to the constructing of the road, and their application to any other purpose was prohibited. The grant was only upon these conditions; the State acts continued, as they must have done, the conditions and limitations, and the act of 1874 has not waived or changed them, and all deeds were subject to these conditions and limitations.

It is submitted that any purchaser receiving such a title of land so granted was bound, at his peril, to know that the conditions had been fulfilled and that the limitations had not been overstepped. He was bound, at his peril, to know whether the constructing company had built the road as required. He was bound to ascertain, at his peril, whether the certificate of the governor was fraudulent or otherwise.

Any person purchasing the land involved was not at liberty to merely look at or have an attorney examine the governor's certificate, but it was his duty to ascertain

whether the original acts had been complied with, whether the land had actually been earned, and whether the required road had in fact been built.

The fact that more than a half million acres of the land remained unpatented, put defendant on inquiry.

All of the facts could, with prudent diligence, have been ascertained.

The vendee, accepting a grant the recitations of which referred to statutes and quoted titles suggesting a conditional grant, was bound to inquire as to the performance of those conditions.

Actual notice of the existence of the public statutes was certainly notice of the conditions, limitations, and prohibitions therein contained.

The deed received by defendant called attention to the statutes.

The principle applicable is approved in *Duncan* v. *Jaudon* (15 Wall., 165).

It is respectfully submitted that the defendant is not now in position to claim that it had a right to purchase the lands the sources of the title to which were thus pointed out, without remaining under the same obligations that had rested upon its grantors.

Upon this point of notice, and as to the character and effect of the deeds involved, counsel for the appellant begs to refer for reasoning and citations to the able and convincing dissenting opinion delivered in this case by Hanford, J. (See Record, pp. 322 to 330.)

V.

THE COURT ERRED IN PROHIBITING THE COMPLAINANT FROM SHOWING THAT THE ROAD HAD NEVER BEEN CONSTRUCTED OR COMPLETED ACCORDING TO THE REQUIREMENTS OF THE GRANTING ACTS; AND ALSO ERRED IN PROHIBITING THE COMPLAINANT FROM SHOWING THAT THE CERTIFICATES OF THE GOVERNORS THAT THE ROAD WAS BUILT AND CONSTRUCTED, WERE OBTAINED BY MISREPRESENTATION, AS CHARGED IN THE BILL.

It appears from the record that during the proceedings had in the case (pp. 226 to 229) that on August 6, 1891, the parties appeared before the examiner to take testimony. It was claimed on behalf of the complainant that under the issue joined the complainant had the right to prove the allegations of fraud charged in the bill, and to prove such fraud complainant called as a witness one George Joseph and asked to have his testimony taken. Counsel for the defendant company objected to the introduction of the witness, and claimed that the only questions to be established by proof were upon issues between the plea and the reply filed; that the onus of the truth of the plea was on the defendant, and that the question of construction of the road or any other questions of fraud charged in the bill could not be inquired about.

Said witness was sworn and was asked as to his acquaintance with the line of the road from Eugene over the mountains to southeastern Oregon.

Counsel for defendant objected to the evidence as incompetent and immaterial and as not proper to be introduced at that time.

The witness was asked to state fully whether or not any wagon road was ever constructed or built by the Military Road Company over or upon the route of said road, and fully as to the construction or nonconstruction of said road.

Counsel for defendant objected and the question of the receiving of the testimony involved was certified to the court.

The court held that the burden of proof was upon the defendant to support the allegations of the plea, and the witness was directed to stand aside, and the defendants proceeded to take the testimony of their witnesses in the case.

After the completion of the taking of the testimony put in by the defendants, and on October 26, 1891, the parties again appeared before the examiner, and counsel for the complainant offered to call witnesses to show that the road had never been completed, and also that the certificates of the governors involved were obtained by misrepresentation, as charged. (See record, pp. 284 to 286.)

The following appears:

> Counsel for the complainant now offers to call witnesses to show that the wagon road known as the Oregon Central Wagon Road, and referred to in the bill in this suit, was never built as required by the act of Congress, and that the certificates of the governors that it was built and constructed were obtained by misrepresentation, as shown in the bill.
>
> Counsel for the defendant, the California and Oregon Land Company, objects to the introduction of this

testimony as immaterial and irrelevant for the purpose of controverting the matters contained in the plea or the testimony introduced in pursuance thereof.

The record then sets forth (p. 285):

EXAMINER. Let the record show that George Joseph, heretofore sworn as a witness in behalf of the complainant in this case, was thereupon called to the stand and interrogated by complainant's counsel as follows:

Question. State fully and at length all you know as to whether or not the wagon road known as the Oregon Central Military Wagon Road referred to in the bill in this suit was ever built or constructed, and describe fully all that was done by said company in reference thereto, and state fully all that you know in reference to the way the certificates of the governors of Oregon, that said road or portions thereof had been built, were obtained.

Counsel for the defendant objects to the question as irrelevant and immaterial to the issue made by the plea in this case, and as immaterial for the purpose of answering any evidence taken in support of the plea, and for the further reason that the plea raises no issue upon the question of the road; and before an answer shall be made to the question counsel for the defendant, the California and Oregon Land Company, requests the examiner to certify the question to the court for his opinion as to whether the question should be answered.

Examiner's Note.—Before taking the answer I will certify this question to the court, as requested by the counsel for the defendant, for the purpose of taking the opinion of the court as to the relevancy and materiality of the testimony sought by the question referred to.—George H. Durham, examiner.

> The above question having been submitted to the court, and the objections of defendants' counsel by it sustained, the counsel for complainant then stated that, in view of the ruling of the court, he had no further testimony to offer, and therefore rested his case.

The plea filed by said defendant which has been before referred to sets forth, on page 82, the averment "that each of said several certificates was made honestly and in good faith, without any fraudulent intent or procurement or false representation by any person whomsoever."

On page 129 of the record it is set forth that the counsel for the complainant, October 26, 1891, offered to call witnesses to show that the road in question was never built as required by the act of Congress, and that the certificates of the governors that it was built and constructed were obtained by misrepresentation as charged in the bill. Counsel for the defendant objected on the grounds of immateriality and irrelevancy.

Joseph George was asked as a witness whether the road was ever built or constructed, and was told to designate fully all that was done by the military company in reference to such construction; he was also directed to state fully all he knew in reference to the way the certificates of the governors of Oregon that said road or portions thereof had been built, were obtained. Counsel for defendant made objection, and the opinion of the court as to the relevancy and materiality of the testimony sought, was taken.

On said October 26 (p. 131), the question and objection were certified to the court and the court sustained the ob-

jection and excluded the testimony. It thus appears that after the taking of the testimony offered on the part of the defendant the court refused to allow the question of the construction of the road, and also refused to allow the question of the issuance of the certificates upon misrepresentation to be tested upon the trial of this case.

It is an interesting and instructive commentary upon this litigation that immediately following the order just referred to (p. 132) appears an order by which the court, upon the application of the defendant, amends its plea as written (p. 82), by striking out the words:

> That each of said several certificates were made honestly and in good faith, and without any fraudulent intent, or procurement, or false representation by any person whomsoever.

It is manifest that the court below coöperated in excluding from the trial the questions which Congress intended should be tried, and the questions which this court may well have anticipated would be tried when the case was sent back for the filing of replies and for a new trial.

The order in which these proceedings of the court appear in the record indicates that the court excluded the evidence offered first, and then, with a view to protect the defendant, struck out upon their request, that portion of their plea, which alleged that the certificates were honestly made and that they were procured without fraudulent intent or false representation.

It is respectfully submitted to this court that the trial below was so managed as to avoid and evade those tests which Congress and this court expected and intended should be applied in the trial of this case.

In this connection the attention of this court is now called to the phraseology of the decree of the circuit court which now stands as the decree in defendant's favor in this case. This decree bears date December 7, 1891. The decree recites that the cause was heard upon the bill, the amended pleas and answer of the defendant, replication thereto, the testimony and exhibits, and states that argument had been made by counsel, and then continues as follows (p. 133): "On consideration whereof the court finds that the certificates of the governor of Oregon declaring the road mentioned in the bill to have been duly constructed were truthfully made without fraud or misrepresentation on the part of any one," and then alleges the defendant to be a purchaser of the land in good faith for a valuable consideration and without notice of any fraud or misrepresentation. Upon this it is ordered, adjudged, and decreed that the plea of the defendant be sustained and that the bill of complaint be dismissed.

The significant fact will be noticed that after the court had prohibited evidence offered by the complainant showing the fraud and misrepresentation connected with the certificates before the taking of defendant's testmony, and had also prohibited the complainant from showing, after the taking of defendant's testimony, that the road was never built, and also that the certificates of the governors that it was built were obtained by misrepresentation as charged in the complaint, and after having subsequently amended the plea in order to protect the defendant against the vice of said rulings, the court, as a part of its decree,

declares that the certificates involved "were truthfully made without fraud or misrepresentation on the part of any one."

The decree of the circuit court of appeals affirming the decree of the circuit court which has just been referred to appears on pages 315 and 316 of the record. The decree of the court of appeals is simply that it is "ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, and the cause is remanded to said circuit court of the United States for the district of Oregon."

It is submitted with great confidence that the action of the court below as set forth was erroneous, and that the errors appearing are of sufficient gravity to require a reversal of the decree appealed from.

If it be held that, as the allegations of the bill charge that the certificates were procured by false and fraudulent representations, and, as the plea and answer as amended make no denial thereof, therefore those allegations stand admitted, then it is error for the court to find and adjudge "that the certificates of the governor of Oregon declaring the road mentioned in the bill to have been duly constructed were truthfully made, without fraud or misrepresentation on the part of any one" (p. 131).

If such finding was permissible then it was error for the court to prohibit the complainant from proving that the certificates "were obtained by misrepresentation, as charged in the bill" (p. 129).

As the circuit court of appeals merely affirmed the decree of the trial court (p. 316), the objectionable finding remains.

It will not do to say that this finding is harmless, as no one is justified in saying that the judgment does not rest upon it.

This finding is in the same sentence with, and is conjunctively connected with, the finding which states that the defendant is a purchaser in good faith, for a valuable consideration, and without notice, and the judgment of dismissal immediately follows. The judgment rests upon the compound finding embraced in the one sentence.

But, above and beyond all this, the procedure detailed shows conclusively that the court below misapprehended its duty under the act of 1889, and the decision of this court relating thereto.

The questions which Congress commanded to be tested by a judicial investigation have not yet been tried.

VI.

DEFENDANT DOES NOT SHOW THAT ACTUAL AND FULL NOTICE WAS NOT RECEIVED.

It appears from the evidence of the defendant that one Colby was a party actively employed on behalf of the company in obtaining the conveyance to it of this land.

It also appears that one Walker was very active and influential in procuring the transfer of the lands and claims to the defendant company. It is shown that Colby is now deceased, while Walker is subjected to considerable criticism by defendant's witnesses, and his whereabout is now unknown to them (pp. 154, 164, 165, 172, 224, 236, 241, 260, 261).

It is submitted, therefore, that the defendant has failed to show that it did not have actual and positive notice and information as to the noncompletion of the road and as to the frauds connected with the governor's certificates, through Colby or Walker, or both of them.

VII.

THE DEFENDANT IS NOT ENTITLED TO THE LANDS IN QUESTION UNDER THE ACT OF 1874, TAKEN IN CONNECTION WITH THE ACT OF 1889, AND THE DECISION OF THIS COURT.

The act of 1874 merely provides for the issuing of patents in cases where the State is already entitled thereto. It expressly disclaims the creation of any new rights. Fairly construed it directs the issuing of patents in cases where the land has been earned, and only in such cases. The act of 1889 commands the Attorney-General within six months after its passage to cause suit to be brought in the name of the United States against all those claiming to own or to have an interest in the lands granted to the State of Oregon by the acts of Congress, which are enumerated, and which include the acts relating to the Eugene City road. The litigation is directed to determine the questions of the seasonable and proper completion of the roads enumerated in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the State of Oregon of the completion of said roads, and the right of resumption of the granted lands by the United States, and to obtain judgments which the court is author-

ized to render, declaring forfeited to the United States all unearned lands, and setting aside patents which have been issued for such lands.

The rights of bona fide purchasers for a valuable consideration are duly saved "if any such there be." It is also directed that the suit shall be tried and adjudicated in a like manner and by the same principles and rules of jurisprudence as other statutes in equity are therein tried, with the right to writ of error or appeal as in other cases.

The scope and meaning of these enactments are now to be construed in accordance with the decision of this court in the *Wagon Road Cases* (140 U. S., 559).

FINALLY.

It is respectfully submitted that the decree should be reversed.

A. X. PARKER,
Assistant Attorney-General.